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In The

Supreme Court of the United States

October Term, 1996

RICHARD P. IEYOUB, in his official capacity as Attorney General of the State of Louisiana; M. J. "MIKE" FOSTER, JR., in His official capacity as Governor of the State of Louisiana; BOBBY P. JINDAL, in His official capacity as Secretary of the Louisiana Department of Health and Hospitals, and MADLYN B. BAGNERIS, in her official capacity as Secretary of the Louisiana Department of Social Services,

Petitioners,

versus

CAUSEWAY MEDICAL SUITE and HOPE MEDICAL GROUP FOR WOMEN, On behalf of themselves and the patients they serve,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a parental consent judicial bypass procedure brought by a minor seeking judicial authorization for an abortion, a juvenile court, having already made the determination that the particular minor before the court is not sufficiently mature and well enough informed to make the abortion decision intelligently on her own among the alternatives, may proceed to determine whether it is in the best interest of the minor to notify and consult with her parent(s) or guardian and, if so, to reconvene the hearing with such parent(s) or guardian present to advise and counsel the minor and to aid the court in making its own determination whether or not the abortion would be in the best interest of the minor, in accord with the express language of *Bellotti II*.

2. Whether a juvenile court in a parental consent judicial bypass procedure is to mechanically apply a simple formula, taken literally from oft-quoted *Bellotti II* language without a factual context, as though performing a ministerial duty or whether the juvenile court must consider each case as a whole and apply the due process principles of reasoned judgment, evidentiary evaluation, and the providing of such protections as the particular circumstances of each case demands.

3. Whether there is true Article III "case or controversy" jurisdiction in a suit raising a facial constitutional attack against statutory provisions providing for court procedures, where none of the named defendants – all state governmental *executive branch* officials (and none holding any office or judgeship in the state's *judicial branch*) – have the state governmental power to enforce or

QUESTIONS PRESENTED FOR REVIEW – Continued

to prevent the state judicial enforcement of such courtroom procedures, even in full compliance with the injunction entered in this case.

4. In deference to Judge Garza's concurrence, whether this Court's jurisprudence finding a "constitutional right" to abortion as to adults and minors or, alternatively, a "constitutional right" to abortions as to only minors, should be reviewed, reexamined, reevaluated, redefined, modified, and/or overruled entirely.

LIST OF PARTIES

The petitioners in this Court (who were the appellants in the appellate court below) are:

(1) Richard P. Ieyoub, in his official capacity as Attorney General of Louisiana,

(2) M. J. "Mike" Foster, Jr., in his official capacity as Governor of Louisiana,

(3) Bobby P. Jindal, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals,

(4) Madlyn B. Bagneris, in her official capacity as Secretary of the Louisiana Department of Social Services.

The respondents in this Court (who were the appellees in the appellate court below) are:

(1) Causeway Medical Suite

(2) Hope Medical Group for Women

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 2

Constitutional and Statutory Provisions Involved in this Case 2

Statement of the Case 2

Reasons for Granting the Writ 7

Question No. 1 7

Question No. 2 23

Question No. 3 26

Question No. 4 27

Conclusion 28

TABLE OF AUTHORITIES

Page

CASES:

Bellotti v. Baird, 428 U.S. 132 (1976) 16

Bellotti v. Baird, 443 U.S. 622 (1979) ..... *passim*

Breaux v. Hoffpauir, 674 So.2d 234 (La. 1996) 25

Causeway Medical Suite v. Ieyoub, 905 F.Supp. 360 (E.D. La. 1995) 1, 4

Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) ..... *passim*

Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc., 404 U.S. 412 (1972) 7

Doe v. Bolton, 410 U.S. 179 (1973) 14

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) 26

Fusari v. Steinberg, 419 U.S. 379 (1975) 17

Hall v. Beals, 396 U.S. 45 (1969) 7

Hodgson v. Minnesota, 497 U.S. 417 (1990) ... 8, 17, 18, 19

H.L. v. Matheson, 450 U.S. 398 (1981) ..... *passim*

In the Interests of the Minor Child, J.M., 590 So.2d 565 (La. 1991) 24

Lambert v. Wicklund, ___ U.S. ___, 117 S.Ct. 1169 (1997) 8

Leavitt v. Jane, ___ U.S. ___, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) 25

Margaret S. v. Treen, 597 F.Supp. 636 (E.D. La. 1984) 3

TABLE OF AUTHORITIES – Continued

Page

Margaret S. v. Edwards, 794 F.2d 994 (5th Cir. 1986) 3

Messer v. Dept. of Corrections, 385 So.2d 376 (La. 1980) 24

Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) ..... *passim*

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 12, 14, 16

Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied sub nom.* Janklow v. Planned Parenthood, 116 S.Ct. 1582 (1996) 19

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992) 3, 24

Tully v. Mobile Oil Corp., 455 U.S. 245 (1982) 6, 18

United States v. Alabama, 362 U.S. 602 (1960) 7

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal:

United States Constitution, Amendment XIV 2, 4

State:

Louisiana Revised Statutes 40:1299.35.0 ..... 2, 24

Louisiana Revised Statutes 40:1299.35.1 2

Louisiana Revised Statutes 40:1299.35.5 ..... *passim*

La. C.C.P. Art. 1 25

OPINIONS BELOW

Petitioners seek a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 14, 1997, in *Causeway Medical Suite; Hope Medical Group for Women, on behalf of themselves and the patients they serve v. Richard P. Ieyoub, Attorney General of the State of Louisiana, Michael J. Foster, Jr., Governor, State of Louisiana, Bobby P. Jindal, Secretary of the Department of Health and Hospitals, and Madlyn B. Bagneris, Secretary of the Louisiana Department of Social Services,* reported at 109 F.3d 1096 (5th Cir. 1997) and reprinted at Appendix A to this petition, p. App. 1.

The opinion of the United States District Court for the Eastern District of Louisiana filed on October 24, 1995 in *Causeway Medical Suite and Hope Medical Group for Women, on behalf of themselves and the patients they serve v. Richard Ieyoub, Attorney General of the State of Louisiana; Edwin Edwards, Governor of the State of Louisiana; Rose Forrest, Secretary of the Louisiana Department of Health and Hospitals; and Gloria Bryant Banks, Secretary of the Louisiana Department of Social Services, in their official capacities and their successors,* reported at 905 F.Supp. 360 (E.D. La. 1995) is reprinted at Appendix D to this petition, p. App. 79.

The district court's Memorandum Opinion filed on August 11, 1995 in *Causeway Medical Suite, and Hope Medical Group For Women, on behalf of themselves and the patients they serve v. Richard Ieyoub, Attorney General of the State of Louisiana; Edwin Edwards, Governor of the State of Louisiana; Rose Forrest, Secretary of the Louisiana Department of Health and Hospitals; and Gloria Bryant Banks, Secretary of the Louisiana Department of Social Services, in their official capacities and their successors,* granting the plaintiffs-respondents' motion for preliminary injunction is not reported in the Federal Supplement, but can be found at 1995 WL 479824 (E.D. La.) and is reprinted at Appendix B to this petition, p. App. 68.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed herein was entered on April 14, 1997 (Appendix A, p. App. 1). Pursuant to Rules 13 and 30 of the Rules of the Supreme Court of the United States, this Petition For Writ of Certiorari is timely filed on July 14, 1997.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment XIV (Appendix F, p. App. 120)
Louisiana Revised Statutes 40:1299.35.0 (Appendix E, p. App. 95)
Louisiana Revised Statutes 40:1299.35.1 (Appendix E, p. App. 95)
Louisiana Revised Statutes 40:1299.35.5 (Appendix E, p. App. 114)

STATEMENT OF THE CASE

Since 1978, Subsection (A) of Louisiana's parental consent statute for minors seeking abortion has required that "[n]o physician shall perform or induce an abortion upon any pregnant woman who is under the age of eighteen years and who is not emancipated judicially or by marriage" unless the physician had received a notarized statement of consent "signed by the mother, father, legal guardian, or tutor of the minor." La. R.S. 40:1299.35.5(A) (Appendix E, pp. App. 96-App. 99).

Subsection (B) provided the "judicial bypass" procedure that was required by this Court in *Bellotti v. Baird*

(Bellotti II), 443 U.S. 622 (1979).[1] Responding to *Bellotti II* and an unsuccessful court challenge,[2] the Louisiana Legislature amended Subsection (B) in 1980 and 1981[3] to comply with *Bellotti II*'s requirements that a *"mature"* minor "shall" be authorized by a court to act on her abortion decision without parental consent. La. R.S. 40:1299.35.5(B)(4) (Appendix E, pp. App. 96-App. 99). The statute further complied with *Bellotti II's* requirement that *immature* minors "shall" be granted such authorization by a court if the court found the abortion was nonetheless "in her best interest." *Id.* Subsection (B)(5). In addition, the 1981 amendment set forth a forty-eight hour time frame for hearing a minor's abortion application in order to comply with *Bellotti II*'s "expediency" requirement. *Bellotti II*, 443 U.S. at 644.

The 1980 and 1981 version of Louisiana's parental consent/judicial bypass law survived a constitutional challenge in the case of *Margaret S. v. Treen*, 597 F.Supp. 636, 650-52 (E.D. La. 1984), *aff'd on other grounds sub nom. Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986). The law thus remained in effect as such until it was amended by Act 1254 of the 1995 Legislative Session ("the 1995 Amendments").

After the Louisiana Legislature enacted the 1995 Amendments, in pertinent part purporting to amend La. R.S. 40:1299.35.5(B), respondents filed a complaint in the

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[1] This Court most recently upheld parental consent statutes with adequate judicial bypass procedures in *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2832 (1992).

[2] *Margaret S. v. Edwards*, 488 F.Supp. 181, 203 (E.D.La. 1980) (striking down Louisiana's skeletal judicial bypass because it did not provide any standards or guidelines for a minor seeking judicial approval for abortion.)

[3] For a more detailed review of the legislative and judicial background of the statute at issue, *see Causeway Medical Suite*, 109 F.3d at 1099-1101 (Appendix A, pp. App. 2-App. 8).

United States District Court for the Eastern District of Louisiana seeking to enjoin the enforcement of this legislation on the alleged grounds that it violated certain constitutional requirements announced by this Court, particularly the plurality opinion of *Bellotti II*.

The 1995 Amendments were struck down by the district court, *Causeway Medical Suite v. Ieyoub*, 905 F.Supp. 360, (E.D. La. 1995), (Appendix D, p. App. 79), holding that the 1995 Amendments constituted an undue burden on the right of minors to have access to abortion services by way of a judicial bypass of the parental consent requirement and thus violated the Due Process clause of the Fourteenth Amendment. The Fifth Circuit, in affirming the district court, held that the 1995 Amendments violated the Due Process clause in the following three respects:

1) The 1995 Amendments changed the required "shalls" for mature/best interest minors to "may," prompting the lower court to rule that § 1299.35.5(B)(4) and (6) as amended violated *Bellotti II* in that such change granted juvenile court judges with unconstitutional discretion. *Causeway Medical Suite*, 109 F.3d at 1106-1110 (Appendix A, at pp. App. 21-App. 30).

2) The 1995 Amendments failed the *Bellotti II* expediency requirements by failing to provide a specific time frame for deciding the merits of a minor's application, and in not providing a time frame in which counseling and evaluation is to be completed and forwarded to the court. *Id.* at 1110-1111, (Appendix A, at pp. App. 30-App. 34); and

3) The 1995 Amendment adding the Parental Notification Provision allegedly violated U.S. Supreme Court jurisprudence that in the lower court's opinion did not allow judges to notify and consult with the parents of an "immature" minor even if the judge found that such consultation would be in the minor's best interests and necessary to aid the judge in his determination of

whether the abortion is in the minor's best interest. *Id.* at 1111-1112 (Appendix A, at pp. App. 34-App. 37) (striking down La. R.S. 40:1299.35.5(B)(5) as amended by Act 1254 of 1995).

In response to the decision of the Fifth Circuit, the 1997 Regular Session of the Louisiana Legislature enacted La. Senate Bill 1558 ("hereafter the 1997 Amendments").[4] The 1997 Amendments remedied the "shall/may" defect for mature/best interest minors by reverting the "may" language back to the pre-1995 "shall" language. The 1997 Amendments further remedied the expediency issues by setting forth specific time periods for evaluation and counseling reports to be filed with the judge and for the court's final ruling. *See* subsection (B)(3) and (7) as amended by Senate Bill 1558.[5]

As to the third ground for the Fifth Circuit's ruling outlined above, the 1997 Louisiana Legislature expressly

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[4] Senate Bill 1558, (Appendix E, pp. App. 107-App. 113) was passed by both houses of the Louisiana Legislature and signed into law by the governor on July 10, 1997. At the time of this writing, the bill has not yet received an official act number.

[5] Senate Bill 1558 changed Act 1254 of 1995 as follows: (1) provides a specific time period of four days in which a state counselor must report back to a judge concerning the minor's maturity level and level of understanding of the abortion decision. Subsection (B)(3); (2) subsection (B)(7) provides a specific time period (immediately or within 48 hours) for the judge to rule on the minor's abortion application; subsection (B)(7)-(13) provides *inter alia* for appeals and expeditious appellate decisions; and (4) subsection (B)(4) and (6) reinstated the court-required "shall order language in instances where the court determines the minor is "mature and sufficiently well-informed" to make the abortion decision, and in instances where the minor is found to be "immature" but where the judge nonetheless determines that the abortion would be "in the best interest of the minor" without parental notification. *Cf.* Appendix E, pp. App. 103-App. 106 and Appendix E, pp. App. 114-App. 119.

preserved the exact language of the Parental Notification Provision as enacted by the 1995 Amendments by providing as follows:

> The Legislature of Louisiana hereby declares that the purpose of this Act is to remedy the issues addressed by the United States Court of Appeals, Fifth Circuit decision rendered on April 14, 1997 in Causeway Medical Suite v. Richard P. Ieyoub, No. 95-31178, with regard to Act No. 1254 of the 1995 Regular Session of the Legislature of Louisiana, *with the exception of the issue regarding the constitutionality of R.S. 40:1299.35.5(B)(5).* By retaining the language of R.S. 40:1299.35.5(B)(5) as enacted by said Act, it is the intention of the legislature in this Act to preserve the language of R.S. 40:1299.35.5(B)(5) for appeal to the United States Supreme Court of the above cited decision.

Senate Bill 1558 (Appendix E, p. App. 113) (emphasis added).

Subsequent to the passage of Senate Bill 1558, the parties entered into a joint "Stipulation of Issuance of Injunction" to be filed in the Fifth Circuit, agreeing that "the Court may enter an order enjoining enforcement of the Parental Notification Provision, as amended by the 1997 Amendments, (La. R.S. 40:1299.35.5(B)(5)) until such time, if ever, as the permanent injunction entered in this case against enforcement of the Parental Notification Provision, as amended by Act 1254, is reversed or vacated."

In that Stipulation, the parties agreed that "any further judicial review in this case will involve consideration of the 1997 Amendments," (citing *Tully v. Mobile Oil Corp.*, 455 U.S. 245, 247 (1982) ("The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision.") *See also Fusari v. Steinberg*, 419 U.S. 379, 387 (1975) (Supreme Court must review lower court decision in light of existing law, not the law in effect

at time judgment was rendered); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412 (1972) (same); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (same); *United States v. Alabama*, 362 U.S. 602, 604 (1960) (same).)

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant this writ application as to Questions Nos. 1, 2, and 3 – but especially as to Question No. 1 – because the United States Court of Appeals for the Fifth Circuit in this case has below decided these important questions of federal law in a manner that reveals they have not, in fact, been, but should be, settled by this Court and, additionally, has, it is submitted, decided them in a way that conflicts with relevant decisions of this Court. The importance of Question No. 4 is contained within Judge Garza's concurring opinion (Appendix A, pp. App. 38-App. 67).

Question No. 1

Admittedly, the most important question in this case is Petitioners' "Question No. 1," whether, in a parental consent judicial bypass procedure brought by a minor seeking judicial authorization for an abortion, a juvenile court, having already made the determination that the particular minor before the court is not sufficiently mature and well enough informed to make the abortion decision intelligently on her own among the alternatives, may proceed to determine whether it is in the best interest of the minor to notify and consult with her parent(s) or guardian and, if so, to reconvene the hearing with such parent(s) or guardian present to advise and counsel the minor and to aid the court in making its own determination whether or not the abortion would be in the best interest of the minor, in accord with the express language of *Bellotti II*.

This Court has observed that "[t]he welfare of the child has always been the central concern of laws with regard to minors," and that to satisfy this concern, the State may pass laws which "protec[t] . . . the right of each parent to participate in the upbringing of his or her own children." *Hodgson v. Minnesota*, 497 U.S. 417, 482-483 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part).

In the case at bar, the Louisiana Legislature has attempted to advance these two interests *as to immature minors only* by amending its parental consent/judicial bypass law in such a way as to give effect to the following *Bellotti II* language:

> "[T]he court may deny the abortion request of an *immature minor* in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case *defer decision until there is parental consultation in which the court may participate.*"

Bellotti v. Baird, 443 U.S. 622, 648 (1979) (*Bellotti II*) (emphases added). Thus, it is suggested that the "[Fifth] Circuit's holding [in this case] is in direct conflict with [this Court's] precedents," *Lambert v. Wicklund*, ___ U.S. ___, 117 S.Ct. 1169, 1170 (1997).

The Louisiana statute at issue codifying and implementing the above language from *Bellotti II* is unique in that it incorporates a "Parental Notification Provision" within the bypass provision of its parental consent statute. The Parental Notification Provision at issue before this Court provides as follows:

> "[(B)](5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court shall decide whether or not it would be in the best interest of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian,

> the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to *advise and counsel* the minor and aid the court in making *its determination* whether or not the abortion would be in the best interest of the minor."

La. R.S. 40:1299.35.5(B)(5) (Appendix E, pp. App. 105, App. 116-App. 117) (as enacted by Act 1254 of 1995 Regular Session of the Louisiana Legislature and retained by Senate Bill 1558 of 1997 Regular Session) (hereinafter "Parental Notification Provision").

The court of appeals struck down the Parental Notification Provision as unconstitutional, agreeing with the argument that it "does not satisfy *Bellotti II*'s anonymity requirement." *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1111 (U.S. 5th Cir., No. 95-31178, 4/14/97) (Appendix A, p. App. 35).

This Court should grant the petition for certiorari because the lower court's ruling on the Parental Notification Provision raises an issue of first impression that is ripe for review. In striking down the Parental Notification Provision, the court of appeals reasoned as follows:

> "Although the Supreme Court has recognized that bypass decision makers can consider whether parental notification would be in the best interest of the minor, *Bellotti II*, 443 U.S. at 640, 99 S.Ct. at 3046-47, and that complete anonymity is not required, *Akron II*, 497 U.S. at 513, 110 S.Ct. at 2980, the Court has *not* held that anonymity may give way to parental notification in bypass statutes."

Causeway, supra, at 1112 (emphasis by court) (Appendix A, p. App. 36).

The lower court then opined that this Court's decision in *H.L. v. Matheson*, 450 U.S. 398 (1981) did not apply despite its ruling that " 'a statute setting out a "mere requirement of parental notice" does not violate the constitutional rights of an immature, dependent minor,' " *id.*

(quoting *Matheson*, 450 U.S. at 409). In supporting this conclusion, the lower appellate court explained:

> "Because the Court has yet to address the question of whether a bypass procedure is required for parental *notification* statutes, we do not read *Matheson* to hold that parental notification is an exception to the *Bellotti II* anonymity requirement."

Id. (emphasis by the court).

It is submitted that a review of this Court's pronouncements on anonymity do not reveal an intent to create an absolute constitutional right for *immature* minors to avoid the guidance of their parents and that this Court should uphold Louisiana's Parental Notification Provision since it is saved by adequate bypass provisions which allow minors to avoid parental notification upon showing either that they are mature enough to make the abortion decision on their own or, even if they cannot show such maturity, that parental notification, nonetheless, would not be in their best interest.

The only issue to which this Court's prior decisions do not speak is whether the notification of an immature minor's parents can be effected by the judge who must determine whether the abortion is in the immature minor's best interest, rather than by a physician as in traditional parental notification statutes. Petitioners submit that the court of appeals' conclusion that the bypass decisionmaker cannot initiate parental notification is contrary to the express language of this Court in *Bellotti II* and its other decisions addressing parental notice and parental consent statutes in the abortion context.

Petitioners urge this Court to grant their Petition for Writ of Certiorari in order to provide Louisiana and her sister states with clarification and direction on the issue of whether the bypass decisionmaker acting as a parental consent substitute can *notify* and consult with the parents of certain *immature* minors for the purpose of aiding the

court in making "its determination," Section (B)(5), on the minor's abortion application, when it has been found to be in the best interests of such minors to do so.

A. The court of appeals erred in its interpretation of *Bellotti II* by misapplying this court's case law on immature minors seeking abortion. At the core of the issue that Louisiana now asks this Court to review is the correct interpretation of the following *Bellotti II* language:

> "[T]he court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby,[6] or the court may in such a case defer decision *until there is parental consultation in which the court may participate.*"

Bellotti II, 443 U.S. at 648 (emphasis added).

In striking down the Parental Notification Provision added by the 1995 Act, the United States Fifth Circuit quoted the above language but then went on to interpret it to mean that a court could participate in, but not *initiate*, a parental consultation:

> " . . . We read the statement from *Bellotti II* to mean that a Louisiana juvenile court can refuse to authorize a minor's abortion if parental notification is in the minor's best interest, or the court may wait until the minor herself seeks parental consultation, and then with both the parents' and minor's input, determine whether an abortion is in the minor's best interest."

Causeway, supra, at 1112 (Appendix A, pp. App. 35-App. 36).

The court of appeals' conclusion that a juvenile court judge must "wait until the minor herself seeks parental consultation," before making its determination of whether the abortion is in the minor's best interest is

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[6] This language is incorporated into the 1997 Act in Section (B)(6) (Appendix E, pp. App. 110-App. 111).

both impractical and contrary to the "significant state interest in supporting the important role of parents in child-rearing." *H.L. v. Matheson*, 450 U.S. at 405.

Louisiana's Parental Notification Provision is nearly identical to the Utah statute upheld by this Court in *H.L. v. Matheson*, 450 U.S. 398 (1981) as applied to immature minor girls. The "only issue" before the *Matheson* Court was "the facial constitutionality of a statute requiring a physician to give notice to parents, 'if possible,' prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents." *Id.* at 407.

In upholding the Utah parental notification statute as to minors who had not shown themselves to be mature, the Court explained that "[a]lthough we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, a statute setting out ***a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor.***" *Id.* at 409 (citing *Bellotti II*, 443 U.S. at 642-643; *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)).

The *Matheson* Court rejected plaintiffs' claim "that the mere requirement of parental notice unduly burdens the right to seek an abortion." *Id.* at 409. Upholding the Utah statute, the Court held:

> "As applied to immature and dependent minors, the statute plainly serves the important consideration of family integrity and protecting adolescents which we identified in *Bellotti II*. In addition, as applied to that class, the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician.

> The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature."

Id. at 411 (footnotes omitted).

The above passage applies directly to Louisiana's Parental Notification Provision, with the only difference being that instead of the abortion doctor giving notice to the immature minor's parents, Louisiana's law provides for the notice to be given by the juvenile court judge who must determine whether the abortion is in the minor's best interest. Louisiana's Parental Notification Provision is even less onerous than the Utah statute in that parental notification by the juvenile court judge can only occur after (1) "the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, *and* (2) that the court further finds "that it is in the minor's best interest to notify her parents or guardian."[7] La. R.S. 40:1299.35.5(B)(5) (as amended by the 1995 and 1997 Amendments) (Appendix E, pp. App. 105, App. 116-App. 117).

Louisiana's Parental Notification Provision further comports with this Court's rulings that prohibit a "parental veto," *Matheson*, 450 U.S. at 409; *Bellotti II*, 443 U.S. at

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[7] Any argument that plaintiffs may make concerning the danger of notifying the parents of a minor in an abusive family should not be given any weight in this facial challenge since this Court cannot presume that juvenile court judges who deal with children from dysfunctional homes on a regular basis would be callous enough to ignore the plight of minors from such homes. Louisiana's statute allows the minor to avoid parental notification by making a showing that such notification "would not be in the minor's best interests," Subsection (B)(6), thus making plaintiffs' argument invalid as a "worst-case analysis that may never occur." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990).

642-643; *Danforth*, 428 U.S. at 74, by providing that if the court makes the above two findings (immaturity and best interest to notify parents), the court "shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to *advise and counsel the minor* and aid the court in making *its [that is, the court's] determination* whether or not the abortion would be in the best interest of the minor." La. R.S. 40:1299.35.5(B)(5) (as amended by the 1995 and 1997 Amendments) (emphasis added).

Therefore, under the express language of the Parental Notification Provision, the parents of the immature minor at the *in camera* hearing do not have the authority to approve or veto the minor's abortion decision, but only to aid the court in making *its* determination. By enacting the Parental Notification Provision, the Louisiana Legislature implicitly recognized that juvenile court judges are lawyers, not social workers, and that the court's statutory duty to act in the best interest of the minor may in some instances require the court to notify and consult the immature minor's parents in order to obtain, *inter alia*, the factors identified in *Doe v. Bolton*, 410 U.S. 179 (1973) as being necessary for making a proper abortion decision, before it can make a *meaningful* determination on whether the abortion is in the minor's best interest.

Moreover, one scenario could involve a teenager who becomes pregnant by a school teacher who had unduly used the influence of his teaching position to persuade the girl that her grades would improve if she participated in a sexual relationship with him. Using the judicial bypass procedure, the teacher could then bring his impregnated student to court to obtain authorization for a secret abortion to avoid criminal prosecution for statutory rape, in addition to the loss of his job and the civil liability resulting from the parent's possible law suit against the teacher and the school.

A judge who is aware of these circumstances of the immature minor would in all likelihood decide that "it would be in the best interest of the minor to notify her parents of the proceedings," Subection (B)(5), rather than "waiting," as the court of appeals would have it, for the immature girl to muster enough courage to consult with her parents herself, and then to persuade the parents to consult with the judge. The court of appeals' interpretation of the Parental Notification Statute has the result of stripping the judge of his statutory duty to act in the minor's best interest, as well as subverting the interests of justice and due process.

Furthermore, the court of appeals' interpretation of the Parental Notification Provision violates this Court's ruling that

> "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."

Matheson, 450 U.S. at 409-410 (citations omitted).

It seems equally unlikely that an immature minor facing a crisis pregnancy will "obtain adequate counsel and support" from a juvenile court judge who may recognize that the minor's best interest requires the counsel of her parents. Therefore, like the Utah statute, Louisiana's Parental Notification Provision "is reasonably calculated to protect minors in appellant's class [of immature minors] by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences." *Matheson*, 450 U.S. at 412.

B. Louisiana's Parental Notification Provision is saved by the 1997 bypass provisions for mature/best interest minors. The judicial bypass requirement originated in the context of parental *consent* requirements for minors to obtain abortions. *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*). The reason for the bypass was to remove the possibility that a third party, *i.e.*, the minor's parent, would "veto" the minor's decision whether to terminate her pregnancy. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

In the case at bar, however, the Parental Notification Provision at issue is **not** a parental *consent* requirement, but rather is a parental *notification* requirement that only applies if the judicial bypass decisionmaker first finds that the minor is "not sufficiently mature and well enough informed" to make the abortion decision, and further that "it is in the minor's best interest to notify her parents or guardian." La. R.S. 40:1299.35.5(B)(5) (as amended by the 1995 and 1997 Amendments). Moreover, as explained in section "A" hereinabove, the purpose of the notification is for the court to consult and obtain information from the parent(s) or guardian, but the court itself must independently make the decision on its own from the evidence before it whether the abortion is in the best interest of the immature minor. Thus, the concern that a minor's parent may bar her ability to obtain an abortion is, by definition, not implicated by Louisiana's Parental Notification Statute.

The court of appeals below pointed out that this Court "has yet to address the question of whether a bypass procedure is required for parental *notification* statutes," thus leaving the court of appeals to reach its own unsupported decision that "we do not read *Matheson* to hold that parental notification is an exception to the *Bellotti II* anonymity requirement." *Id.*

In so ruling, the court of appeals failed to give any weight to the fact that Louisiana's Parental Notification

Statute only applies to *immature* minors for whom it is not apparent that the abortion would be in her best interest. In reviewing the provision at issue, this Court should give careful consideration to its decision in *Hodgson v. Minnesota*, 497 U.S. 417 (1990) since the Louisiana Parental Notification Provision is strikingly similar to the Minnesota statute upheld in *Hodgson*.

The *Hodgson* statute provided a two-parent notice requirement for minors seeking abortion with a judicial bypass provision that allowed a court to order the abortion to proceed without notice upon proof by the minor that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would be in her best interest. *Id.*, 497 U.S. at 417.

Although a majority of this Court rejected the State's submission in *Hodgson* that the statute's two-parent notice requirement was constitutional without any bypass procedure, a different majority of the *Hodgson* Court held that the bypass procedure saved the statute as a whole. *Id.* (The majority upholding the two-parent notice requirement with a judicial bypass consisted of CHIEF JUSTICE REHNQUIST, JUSTICE KENNEDY (writing), JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE O'CONNOR (writing separately)).

The latter majority expressly recognized that "a State has an interest in seeing that a child, when confronted with a serious decision such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice. If anything is settled by our previous cases dealing with parental notification and consent laws, it is this point." *Id.*, 497 U.S. at 483.

This Court has observed that it must review lower court decisions in light of the existing law as most recently amended, not the law in effect at the time judgment was rendered. *Fusari v. Steinberg*, 419 U.S. 379, 387 (considering amendments to Connecticut law designed to remedy problems pointed out by district court ruling);

Tully v. Mobile Oil Corp., 455 U.S. 245, 247 (1982) ("The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision."); *see also* the parties' stipulation referred to in the "Statement of the Case," *supra*.

Therefore, the 1997 Amendments should be considered by this Court to "save" the Parental Notification Provision at issue. The 1997 Amendments returned the "shall order" language to La. R.S. 40:1299.35.5(B)(4) (Appendix E, p. App. 116) and (6) (Appendix E, p. App. 117). These provisions, therefore, now serve, together with Subsection (B)(5)'s own best-interests test for notification within the statute, as the "notification bypass" required by *Hodgson*. Thus, Louisiana's law as amended in 1997 fully comports with this Court's pronouncements in *Hodgson*, because it is simply a parental notification provision with the mandated bypass requirements.

C. This court's pronouncements on anonymity do not create a constitutional right for immature minors to avoid the guidance of their parents. As discussed *supra*, *Hodgson* dictates that Louisiana's Parental Notification Provision is constitutional since the 1997 Amendments allow minors to avoid notification upon a showing that they are mature or that parental notification would not be in their best interest. The issue thus arises as to whether the Parental Notification Provision is invalidated for failure to maintain "anonymity" simply because it is contained within the judicial bypass provision of Louisiana's parental *consent* statute.

As to that issue, the court of appeals concluded that this Court "has *not* held that anonymity may give way to parental notification in bypass statutes." *Causeway*, *supra*, at 1112 (emphasis by the court) (Appendix A, p. App. 36). The court of appeal erred in so ruling by misinterpreting and misapplying this Court's pronouncements on the issue of a minor's right to anonymity as explained more fully below.

Because this Court has held that two-parent notification statutes with judicial bypass is constitutional, *Hodgson, supra,* and because this Court has never held that a judicial bypass is required for a one-parent notification statute,[8] the conclusion is inescapable that an immature minor who has not met the bypass requirements (mature/best interest not to notify) is **not** entitled to remain anonymous vis-a-vis her parents. The very nature of constitutionally valid parental notification statutes in which the physician notifies the parent(s) that the minor is seeking an abortion proves without question that this Court has never intended to create a constitutional right for all immature minors to avoid the counsel and guidance of parents when facing an abortion decision. *Hodgson,* 497 U.S. at 500 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[In *Matheson*] we held that a two-parent notice statute without a bypass was constitutional as applied to immature minors whose best interest would be served by notice. Like the statute before the Court in *Matheson,* the Minnesota statute, as amended by subdivision 6, requires a physician to notify the parents of those immature minors whose best interest will be served by the communication.").

The court of appeals thus erred in failing to recognize that the *Bellotti II* Court's anonymity requirement was not intended to shield a minor from her parents, who indeed have been held to have a liberty interest, protected by the Constitution, in having an opportunity to participate in the care and nurture of their children. *Hodgson,* 497 U.S.

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[8] Although the Eighth Circuit has held that bypass is required in one-parent notification statutes, this Court declined to address the issue when it denied certiorari. *Planned Parenthood, Sioux Falls Clinic v. Miller,* 63 F.3d 1452 (8th Cir. 1995), *cert. denied sub nom. Janklow v. Planned Parenthood,* 116 S.Ct. 1582 (1996). However, this issue is not dispositive to the case at bar since Louisiana's Parental Notification Provision has the required judicial bypass requirements as discussed, *supra.*

at 484. Rather, the *Bellotti II* Court's anonymity requirements were in the context of (1) protecting the minor's initial access to the courts and (2) protecting the minor from *public* scrutiny.

(1). Louisiana's law protects minors' anonymous access to the courts. In *Bellotti II*, this Court held that "every minor must have the opportunity, if she so desires, to go directly to court without first consulting or notifying her parents." *Bellotti II*, 443 U.S. at 647. The Court then set forth the judicial bypass requirements necessary to constitutionally validate parental consent statutes, i.e., the opportunity for the minor to show that she is "mature and well enough informed to make intelligently the abortion decision on her own," or that the "abortion would nevertheless be in her best interests." *Id.* As discussed above, Louisiana's law as amended in 1997 codifies these *Bellotti II* requirements at Sections (B)(4) and (B)(6) (quoted *supra*).

This Court's pronouncements following the bypass requirements in *Bellotti II* read:

> "There is, however, **an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision.** Also, as we have observed above, parents naturally take an interest in the welfare of their children, an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents."

Id. at 648.

The *Bellotti II* Court then when on to set forth the following guidance to judges, the interpretation of which is before this Court today:

> "If, all things considered, the court determines that an abortion is in the minor's best interest, she is entitled to court authorization without

> any parental involvement.[9] On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby,[10] **or the court may in such a case defer decision until there is parental consultation in which the court may participate.**[11] *Id.*

Louisiana has codified the above paragraph into its law as indicated by footnotes 9 through 11. By striking down Louisiana's Parental Notification Provision, the court of appeals failed to consider the two sentences that followed the above paragraph: "But this is the full extent to which parental involvement may be required. For the reasons stated above, the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions *upon initial access to court.*" *Id.*

Therefore, the *Bellotti II* ruling would bar a court from notifying parents, immediately upon the minor's filing of the application, that their daughter is seeking judicial bypass, since such a notification would impose upon the minor's right to anonymous access to the court. However, once a minor has been given the opportunity and has failed to prove to the court that she is either mature or that the abortion would be in her best interest without parental consultation, the court "may in such a case defer decision until there is parental consultation in which the court may participate." *Id.* The court of appeals erred in ruling that a juvenile court judge cannot initiate such parental consultation, and Petitioners urge this

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[9] This statement is codified in Section (B)(6) of the 1997 Amendments.

[10] This statement is also codified in Section (B)(6) of the 1997 Amendments.

[11] This statement is the language on which Section (B)(5), the Parental Notification Provision at issue, is based.

Court to resolve this misinterpretation by granting the petition for certiorari.

Louisiana's Parental Notification Provision is in complete accord with *Bellotti II* and its progeny in that it allows a minor anonymous access to the court, and an opportunity to carry her burden of proving that she is mature enough to make the decision on her own or that parental notification would not be in her best interests. By concluding that the Parental Notification Provision "create[s] an exception [to anonymity] that swallows the rule," *Causeway, supra,* 109 F.3d at 1112 (Appendix A pp. App. 36-App. 37), *the court below erred in failing to reconcile a minor's right to have anonymous access to the court from a parent's right to be notified and consulted about their immature daughter's abortion decision.*

(2.) The Parental Notification Provision protects a minor from public scrutiny. As recently as 1990, when reviewing an Ohio parental notification statute, this Court has explained that "even if the Bellotti principal opinion is taken as setting the standard, *we do not find complete anonymity critical.* [The Ohio statute], like the statutes in Bellotti and Ashcroft, takes reasonable steps *to prevent the public* from learning of the minor's identity." *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 513 (1990) (*Akron II*).

The Parental Notification Provision at issue likewise protects a minor from public scrutiny. Louisiana's judicial bypass statute has always (even before the 1995 and 1997 Amendments) provided that each application shall be heard anonymously in chambers. La. R.S. 40:1299.35.5(B)(3) (Appendix E, pp. App. 97, App. 104, App. 115).

Therefore, Louisiana's Parental Notification Provision does not breach this Court's pronouncements on "anonymity" since it neither prevents a minor from having initial access to the courts in an anonymous manner,

and since it does not subject the minor to public disclosure.

Question No. 2

This Court should grant this writ application to review Petitioners' "Question No. 2." Although, as explained in the Statement of the Case, the "may" and "shall" *language* issue is now moot with the enactment of Senate Bill 1558 of 1997, the underlying question remains as to whether the juvenile court is to mechanically apply to each of these cases a simple formula, taken literally from oft-quoted *Bellotti II* language without a factual context, as though performing a ministerial duty or whether the juvenile court must consider each case as a whole and apply the due process principles of reasoned judgment, evidentiary evaluation, and the providing of such protections as the particular circumstances of each case demands, including issuing and assuring enforcement of child protective orders against physical abuse by a boyfriend in his twenties intimidating his battered-syndrome minor girlfriend into applying for an abortion that she does not, in fact, herself desire, in his attempt to escape legal, social, economic, and moral responsibility for fathering a baby, and notifying parent(s) or guardian where the minor is too immature to make the abortion decision on her own and such boyfriend's intimidation is done without the knowledge of the minor girl's parent(s) or guardian and the consequent protection that the minor girl's parent(s) or guardian could give her.

The reason that this question underlies the decisions in the courts below in this case is that this question points to what the purpose of the Louisiana Legislature was in the first place, in having enacted Act 1254 of 1995 (Appendix pp. App. 99-App. 103) and in having used the "may" terminology, which under Louisiana law and jurisprudence signified only the following:

1. Jurisdictional empowerment to grant the relief to which the minor was entitled, *per* La. C.C.P. art. 1, according to this Court's jurisprudence, *per* R.S. 40:1299.35.0 (Appendix E, p. App. 95), as the controlling criteria of such cases. It must be understood that under Louisiana law and jurisprudence all such procedural statutory provisions must be construed together, *in pari materia*, as though one body of law, regardless of the placement of some provisions within the Revised Statutes and others within codes of procedures. *See In the Interests of the Minor Child, J.M.*, 590 So.2d 565, 568-569 and 570-571 (La. 1991).

2. A legislative mandate that the juvenile courts are to employ the due process principles of "reasoned judgment," *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, 112 S.Ct. at 2806, the due process avoidance of a "simple rule," *id.*, or a set "formula," *id.* (quoting HARLAN, J., from a previous decision), for disposition of these cases, and the due process requirement of providing "such procedural protections as the particular situation [in each case] demands," 16 C.J.S. "Constitutional Law" § 967, pp. 245-246 (to avoid the violation of Due Process that occurs when a particular judicial result is arbitrarily mandated without regard for the particular, often unique, factual circumstances and exigencies that may attend to any given case).

3. A legislative reminder, in the face of arguments by abortion proponents to the contrary, that neither the granting nor the denying of relief is "a purely ministerial duty, without the exercise of discretion," *Messer v. Dept. of Corrections*, 385 So.2d 376, 378 (La. 1980), the discretion inherent in "the evaluation of evidence," *id.*

What Act 1254's language did *not* signify under Louisiana law and jurisprudence is that a juvenile court judge could make up the controlling law of any case subjectively out of his own head, as Respondents-Plaintiffs argued in the courts below. No court in Louisiana, a jurisdiction deriving from the Civilian tradition (which does not even recognize *stare decisis*), is empowered to do that; it is prohibited under Louisiana law and jurisprudence.

Thus, the Fifth Circuit panel below, in order to strike down Act 1254 of 1995, gave it, contrary to a correct application of the Louisiana law and jurisprudence of statutory interpretation, an interpretation which made it unconstitutional – which *is* in itself an "absurd consequence" under Louisiana's law and jurisprudence – and did so in the face of the panel's own citing of *Breaux v. Hoffpauir*, 674 So.2d 234, 236 (La.1996) (avoiding an interpretation of a Louisiana statute which would lead to absurd consequence of invalidity, inasmuch as state definition of "actual wages" would have otherwise been illegal [that is, unconstitutional for being in conflict with the Supremacy Clause] under federal statute). It is submitted that such a process of adjudication as used by the Fifth Circuit panel in this case effects a "federal-court nullification of state law," in violation of *Leavitt v. Jane*, ___ U.S. ___, 116 S.Ct. 2068, 2072, 135 L.Ed.2d 443 (1996). Although a referral to the Louisiana Supreme Court for a definitive interpretation, as was done in *Bellotti*, would have rectified the transmogrification that the federal courts below made of Act 1254's statutory meaning and intent and the manner in which it would have actually operated under Louisiana law and jurisprudence and although Petitioners herein were prepared to make that request of this Honorable Court in connection with this writ application, the Louisiana Legislature, already in session when the Fifth Circuit decision herein was entered, decided to amend the "may" language found by the federal courts below to be offensive. However, the

Fifth Circuit's rejection of juvenile court initiative reveals that the true issue underlying the language problem – presented by Petitioners' "Question No. 2" herein – is still very much alive and needs definitive resolution and clarification by this Court.

Question 3.

Petitioners-Defendants herein suggest that the federal courts lack U.S. Constitution Art. III "case or controversy" jurisdiction to adjudicate the full or even significant parts of the statute assailed in this case. The adjudication sought in this case is based on the named defendants' official interest in enforcing the legislative act. Indeed, because the entire effect of all of Act 1254 of 1995 was successfully sought to be negated by enjoining the named defendants from enforcing same, the adjudication is based on the named defendants' official interest in enforcing the entirety of the legislative act. However, in actuality, the named defendants can neither enforce, nor prohibit the enforcement, application, or use of, the court procedures contained in such legislative act.

Petitioners-Defendants have no power under state law or otherwise to enforce statutory court procedures to be applied by the state courts in private civil actions to which none of Petitioners-Defendants will ever be a party – certainly, not in an official capacity anyway. In *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the U.S. Supreme Court held that, despite Eleventh Amendment immunity of states, state officials *who have the power to enforce* state laws which contravene the U.S. Constitution, may be enjoined from commencing state court actions to enforce them (in *Young* a confiscatory railroad rate). In this case, however, none of the named defendants has the power to enforce private-action court procedures. Enjoining the named defendants from enforcing the court procedures in this case is tantamount to enjoining the President and Attorney General of the United

States from enforcing the Federal Rules of Civil Procedure. The injunction, in either case, is hypothetical and meaningless.

While the state attorney general is mentioned in the statutory provisions for review and approval of forms prepared by some state court clerks, those provisions were in pre-existing versions of La.R.S. 40:1299.35.5 prior to Act 1254 of 1995 and were unchanged by Act 1254 of 1995. Thus, the injunction in this case as to Act 1254 only does not even reach the attorney general with respect to being mentioned in the statute. Moreover, the attorney general completed this function years ago and had nothing further to do under Act 1254 of 1995.

The closest to a justiciable controversy that any of the named defendants comes is the Secretary of Health and Hospitals and, to a lesser extent, the Secretary of Social Services. But their involvement in these procedures is not essential to the operation of the statute. All the legislature was trying to do by mentioning their departments was to make the resources already existing within state government available to the juvenile courts and to the minor applicants in order to provide expert testimony as to the minor's maturity, inexpensively and objectively. Even if these departments could not render these services under the injunction, the court proceedings still continue as usual, with the minor applicant having to adduce her own expert testimony, as needed, and/or the juvenile court exercising its inherent judicial power to appoint willing experts from the private sector to conduct the interview, consultation, and evaluation for purposes of maturity-level measurement and the rendering of expert testimony on same.

Question No. 4

Petitioners-Defendants raise this question solely in deference to Judge Garza's concurrence in the Fifth Circuit's decision below and, for argument, incorporate his

concurring opinion (Appendix A, pp. App. 38-App. 67) by this reference as though copied herein *in extenso*.

CONCLUSION

Louisiana's Parental Notification Provision does not impose an undue burden on a minor seeking an abortion. The above discussion shows that the Parental Notification Provision satisfies the four criteria set forth by the plurality in *Bellotti II*[12] by (1) allowing the minor to show the maturity to make her abortion decision on her own; (2) by requiring the juvenile court to authorize her consent upon a showing that parental consultation would not be in her best interest and that the abortion would be in her best interest; (3) by ensuring the minor's anonymity from public disclosure and for her initial access to the court where she can confidentially make her bypass showing of maturity/best interest; and (4) by providing specific time limits that satisfy the requirement that a bypass procedure be conducted with expedition.

Petitioners thus respectfully request that this Court grant the Petition for Writ of Certiorari in this case to resolve an issue that cuts to the core of this nation's ability to protect the welfare of children by enabling parents of immature minors to be notified of one of the most serious decisions that their daughter will ever face – the traumatic and irreversible decision of whether to abort her unborn child by means of a surgical procedure that is not without medical risk to the minor herself. In upholding Ohio's parental notification statute, this Court in *Akron II* summed up the significance of the case at bar in an eloquent manner when it stated:

> "A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound

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[12] The "four criteria" of *Bellotti II* were so identified by this Court in *Akron II*, 497 U.S. at 503.

> philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, *for most of its people, the beginnings of that understanding will be within the family, society's most intimate association*. It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. The statute in issue here is a rational way to further those ends. *It would deny all dignity to the family to say that the State cannot take this reasonable step. . . .* "

Akron II, 497 U.S. at 520.

Respectfully submitted,

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Dated: July 14, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-31178

CAUSEWAY MEDICAL SUITE; Hope Medical Group for Women, on behalf of themselves and the patients they serve,

Plaintiffs-Appellees,

Versus

Richard P. IEYOUB, Attorney General of the State of Louisiana, Michael J. Foster, Jr., Governor, State of Louisiana, Bobby P. Jindal, Secretary of the Louisiana Department of Health and Hospitals, and Madlyn B. Bagneris, Secretary of the Louisiana Department of Social Services,

Defendants-Appellants.

(Filed April 14, 1997)

Before POLITZ, Chief Judge, and EMILIO M. GARZA and STEWART, Circuit Judges.

STEWART, Circuit Judge:

We must decide whether certain provisions of Act 1254 (codified at La. R.S. 40:1299.35.5 (West Supp.1996)), which changed Louisiana's judicial bypass procedure for minors seeking abortions, comports with the Due Process Clause of the Fourteenth Amendment. We hold that it does not and affirm the district court's summary judgment which permanently enjoined La. R.S. 40:1299.35.5(B).

LEGISLATIVE BACKGROUND

In Louisiana, minors under the age of eighteen must obtain the consent of at least one parent or legal guardian before a physician has the legal authority to perform an abortion. La. R.S. 40:1299.35.5(A) (West 1992). However, a physician may perform the abortion without the consent of a parent or legal guardian if the minor exercises her rights under a judicial bypass procedure prescribed in La. R.S. 40:1299.35.5(B). Section 1299.35.5(B) has, since 1978, undergone changes. Because this appeal largely turns on the 1995 changes to § 1299.35.5(B), we believe that a brief review of the legislative history of § 1299.35.5(B) sheds valuable light on the issues before us.

A. The 1978 Version of La. R.S. 40:1299.35.5(B)

We begin in 1978, when the Louisiana Legislature enacted La. R.S. 40:1299.35.5 (the 1978 Act), which, among other things, regulated the circumstances under which minors could obtain abortions. Notably, the 1978 Act, while providing for a judicial bypass, gave little (if any) guidance to courts faced with minors seeking abortions. Subsection (A) of the 1978 Act, titled "Notice and consent," provided that the parents or legal guardian of a minor under eighteen must receive actual notice twenty-four hours before the minor had an abortion or, if the parent or legal guardian could not be reached, that parent or legal guardian must receive constructive notice seventy-two hours before the abortion. The sole exception to these parental notification requirements was a bare-bones judicial bypass provision, which stated simply

"unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman." Subsection (B) provided that if the minor was under the age of fifteen, she must obtain informed, written consent from a parent or legal guardian or "obtain[ ] an order from a court having jurisdiction over her that the abortion be performed or induced." Neither subsection (A) nor (B) provided any criteria that must be met before a judge could, without any notice to the parent(s) or legal guardian(s), order a minor to have an abortion.

Then, in 1979, the Supreme Court handed down *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (*Bellotti II*), in which a plurality of the Court set forth the standards that should govern the judicial bypass procedure for minors seeking abortions. Recognizing the parent-child tension that may accompany a minor's wish to have an abortion, the Court held that a minor may seek an order from a court, without the consent or notification of a parent or legal guardian, that authorizes the procedure. *Id.* at 646-48, 99 S.Ct. at 3049-51. In particular, the Court held:

> If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must* authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court *must* authorize the abortion.

Id. at 647-48, 99 S.Ct. at 3050 (emphasis added). Approximately eight months after *Bellotti II* was decided, Louisiana's skeletal judicial bypass provision was struck down as inconsistent with *Bellotti II*. In *Margaret S. v. Edwards*, 488 F.Supp. 181, 203 (E.D.La.1980) (*Margaret S.(I)*), the district court held: "This section [§ 1299.35.5(B)] says nothing more than the pregnant minor may receive an order from a 'court having jurisdiction over her that the abortion be performed or induced.' This is not enough. . . . La.Rev.Stat.Ann. § 40:1299.35.5(B) sets forth no standards or guidelines for the minor seeking judicial approval for abortion."

B. The 1980 and 1981 Versions of La. R.S. 40:1299.35.5(B)

In 1980, the Louisiana Legislature responded to *Margaret S.(I)* and, among other things, changed La. R.S. 40:1299.35.5(B) to comply with *Bellotti II*. Most importantly for purposes of this appeal, the new statute contained the mandatory language from the *Bellotti II* decision. La. R.S. 40:1299.35.5(B) provided in part: "The court *shall* authorize the abortion only if the court finds that the woman is sufficiently mature and well-informed to make an intelligent decision on her own concerning the abortion, or, if the court finds that regardless of the capacity of the woman to make the decision, the abortion would be in her best interest." (Emphasis added). The 1980 version also included an expediency clause: "Such applications shall be heard summarily *and expeditiously* and shall take precedence over matters on the docket of the court." (Emphasis added).

In 1981, Louisiana modified its abortion statute, beginning with a general statement of legislative intent. Section 1299.35.0 (West 1992) provided in part: "It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by decisions of the United States Supreme Court." In 1981, the legislature also refined and expanded § 1299.35.5(B), and the pertinent sections read as follows:

> (3) Each application shall be heard in chambers, confidentially, in a summary manner, and within forty-eight hours of the filing thereof.
>
> (4) If the court finds that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court *shall* issue an order authorizing the minor to act on the matter without parental consultation or consent.
>
> (5) If the court finds that the minor is not competent to make the decision concerning the abortion on her own, but finds that the abortion nevertheless would be in the best interest of the minor, the court *shall* issue an order authorizing the abortion.

(Emphasis added). Subsections (4) and (5) parsed out the "maturity and well-informed" provision and the "best-interests-of-the-minor" inquiry. As with the 1980 version, the 1981 version of § 1299.35.5(B) retained the mandatory "shall" language. However, the word "expeditiously" was removed and a forty-eight hour time frame for hearing a minor's application was imposed. With these new changes in place, § 1299.35.5(B) survived a constitutional attack the next time around. *See Margaret S. v. Treen*, 597 F.Supp. 636, 650-52 (E.D.La.1984) (*Margaret S. (II)*), *aff'd on*

other grounds sub nom. Margaret S. v. Edwards, 794 F.2d 994 (5th Cir.1986).[1]

C. *Act 1254 – The 1995 Version of La. R.S. 40:1299.35.5(B)*

And so it was for fourteen years. In 1995, however, the Louisiana Legislature went back to the drawing board with Act 1254, which expanded and changed § 1299.35.5(B) to read in part:

> (3) Each application shall be heard in chambers, anonymously, in a summary manner, and within forty-eight hours of the filing thereof.
>
> (4) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court *may* issue an order authorizing the minor to act on the matter. Prior to any such order, the court may require the minor to participate in an evaluation and counseling session with a mental health professional from the Department of Health and Hospitals, office of mental health, and a staff member from the Department of Social Services, office of community services. The court may refer the petitioner, if necessary,

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[1] The district court in *Margaret S. (II)* stated that the 1981 judicial bypass procedure provided for an "expeditious hearing of the matter. . . . " 597 F.Supp. at 652. As we have noted, however, the word "expeditious[ ]" was removed from the 1981 statute. The district court did not consider the meaning of "summary manner" as defined under Louisiana law to determine whether the new subsection (3) met the *Bellotti II* expedition requirement.

> to the appropriate Department of Health and Hospitals, office of mental health regional office to arrange the evaluation and counseling session within forty-eight hours of the ex parte hearing, excluding legal holidays.
>
> (5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court shall decide whether or not it would be in the best interest of the minor to notify her parents or guardian of the proceedings. *If the court finds that it is in the minor's best interest to notify her parents or guardian, the court shall so notify* and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.
>
> (6) If the court finds that the minor is not competent to make the decision concerning the abortion or that it would not be in the minor's best interest to notify her parents or guardian, the court *may* issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interest of the minor.

(Emphasis added). Three changes to Louisiana's bypass procedure are relevant for purposes of this appeal:[2] (1) in

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[2] Although the plaintiffs challenged and the district court enjoined the expediency provision in subsection (3), that subpart largely remained unchanged in Act 1254. The legislature only changed "confidentially" to "anonymously." This particular change has not been challenged by the plaintiffs.

subsections (4) and (6) (which correspond to subsections (4) and (5), respectively, in the 1981 statute), "shall" has been changed to "may," so that if the juvenile court finds that a minor is mature and well-informed or that an abortion would be in the minor's best interest, the court now "may" order an abortion; (2) subsection (4) permits judges to refer a minor to a state-sponsored counseling and evaluation session within forty-eight hours of the ex parte hearing; and (3) subsection (5) states that a juvenile court judge is compelled to notify the parents or guardian of an immature minor if doing so is in the best interest of the minor.

PROCEDURAL HISTORY

On July 6, 1995, Causeway Medical Suite and Hope Medical Group for Women (plaintiffs) filed suit challenging the constitutionality of Act 1254. The plaintiffs sought injunctive relief, claiming that Act 1254 violated the Due Process Clause of the Fourteenth Amendment because Act 1254 (1) provided juvenile court judges discretion to deny a minor an abortion even though the minor demonstrated that she was mature and well-informed or that the abortion would be in her best interest; (2) failed to establish a time limit for an expeditious resolution of the minor's bypass application; (3) allowed the juvenile court to refer minors to state-sponsored evaluation and counseling without providing any time frame within which counselors are to report back to the court, thereby depriving minors of an effective opportunity to obtain an abortion and preventing the minor from remaining anonymous; and (4) breached the minor's confidentiality by permitting the juvenile court to notify the minor's

parent that she is seeking an abortion if the court finds such notification would be in the minor's best interest.

With one exception,[3] the district court agreed with the plaintiffs on each of these points. 905 F.Supp. 360, 364-66 (E.D.La.1995). Accordingly, the district court entered summary judgment, permanently enjoining Act 1254 because it "constitute[d] an undue burden on the right of minors to have access to abortion services by way of a judicial bypass of the parental consent requirement and thus violates the Due Process clause of the Fourteenth Amendment." *Id.* at 366. This appeal followed.

DISCUSSION

The State makes three claims on appeal. First, it claims that the plaintiffs do not have standing to bring this lawsuit because there is no "case or controversy." Second, the State argues that the proper standard of proof for facial challenges requires plaintiffs to demonstrate that Act 1254, under no set of circumstances, is constitutional. Third, and central to this appeal, the State contends that each of the challenged provisions is facially constitutional. We reject each of these contentions.

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[3] The district court did not rule on the plaintiff's claim that the state-sponsored counseling provision impermissibly breached anonymity. On appeal, the plaintiffs resurrect this argument. We decline to address this claim, however, because it is unnecessary to the disposition of this case. The counseling and evaluation provision is facially unconstitutional for another reason discussed in Part IV.A.2, *infra*.

I. STANDARD OF REVIEW

We review the district court's decision to permanently enjoin Act 1254 for an abuse of discretion. *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir.1996). "The district court abuses its discretion if it (1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction, (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief." *Id.* at 916-17. " 'The standard of review over the district court's grant of a permanent injunction must, of course, be segmented according to the component functions performed by the district court.' " *Peaches Entertainment Corp. v. Entertainment Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir.1995) (quoting *Multnomah Legal Serv. Workers Union v. Legal Serv. Corp.*, 936 F.2d 1547, 1552 (9th Cir.1991)).

This case comes to us from a grant of summary judgment in favor of the plaintiffs. We review *de novo* the district court's entry of summary judgment. *TLI, Inc. v. United States*, 100 F.3d 424, 425 (5th Cir.1996).

II. JURISDICTION AND STANDING

The State suggests that there is no "case or controversy" because the state officials named in this lawsuit do not have "the power to enforce private-action court procedures." As such, the State concludes, the injunction in this case is "hypothetical and meaningless." We reject these claims. The plaintiffs in this case have standing to assert the claims of those minors who seek abortions by

way of a judicial bypass. *See Planned Parenthood of Southeastern, Pa. v. Casey*, 505 U.S. 833, 842-45, 112 S.Ct. 2791, 2803, 120 L.Ed.2d 674 (1992). And the district court had jurisdiction pursuant to 28 U.S.C. § 1343 because the plaintiffs seek redress for a deprivation of a constitutional right under color of state law.

III. THE STANDARD OF PROOF FOR FACIAL CHALLENGES TO ABORTION STATUTES

The plaintiffs in this case have brought a facial challenge, claiming that Act 1254 on its face violates the Due Process Clause of the Fourteenth Amendment. The Supreme Court has articulated two approaches to proving a statute is facially unconstitutional. In *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the Court held that in a facial challenge, "the challenger must establish that *no set of circumstances* exists under which the Act would be valid." Id. at 745, 107 S.Ct. at 2100 (emphasis added). However, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court appeared to temper the Salerno standard by suggesting that an abortion law is facially invalid if *"in a large fraction of the cases in which [the law] is relevant*, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895, 112 S.Ct. at 2830 (emphasis added). Plainly, more statutes will survive a facial attack under *Salerno* than under *Casey*.

Shortly after *Casey* was decided, we held in *Barnes v. Moore*, 970 F.2d 12, 14 n. 2 (5th Cir.), cert. denied, 506 U.S. 1021, 113 S.Ct. 656, 121 L.Ed.2d 582 (1992), that *Casey* did

not overrule Salerno. Since our decision in *Barnes*, however, no clear consensus among federal courts has emerged regarding the standard for facial challenges in a post-*Casey* world. Six Justices from the Supreme Court have expressed their views on this issue, but not in cases receiving a full hearing by the Court. Justices O'Connor, Souter, and Stevens have made it clear that the *Casey* standard controls in the abortion context. See *Janklow v. Planned Parenthood, Sioux Falls Clinic*, ___ U.S. ___, ___, 116 S.Ct. 1582, 1583, 134 L.Ed.2d 679 (1996) (Stevens, J., mem. respecting denial of certiorari) ("While a facial challenge may be more difficult to mount than an as-applied challenge, the dicta in *Salerno* 'does not accurately characterize the standard for deciding facial challenges,' and 'neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles.' ") (quoting Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236, 238 (1994)); *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014, 113 S.Ct. 1668, 1669, 123 L.Ed.2d 285 (1993) (O'Connor, J., joined by Souter, J., conc. in denial of stay pending appeal) (stating that lower courts' application of *Salerno* standard "is inconsistent with *Casey*"). On the other hand, Chief Justice Rehnquist and Justices Scalia and Thomas have stated that the *Salerno* standard applies in the abortion context. See *Janklow*, ___ U.S. at ___-___, 116 S.Ct. at 1584-87 (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting from denial of certiorari). There is also considerable disagreement among the lower federal courts on

this issue.[4] *See generally* Ruth Burdick, Note, *The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split Over the* Salerno *Test*, 23 HASTINGS CONST. L.Q. 825 (1996) (arguing that lower federal courts are likely to remain split over the *Salerno-Casey* choice).

The district court avoided this thicket of disagreement, reasoning that under either approach, Act 1254 was unconstitutional. 905 F.Supp. at 363 n. 2. As such, the district court applied the more rigorous *Salerno* standard. *Id.* at 363. In this appeal, both parties urge us to confront head-on the question of the standard of proof that should govern facial challenges in abortion cases. Specifically, the plaintiffs claim that the statements made by Justices O'Connor and Souter in *Fargo Women's Health Organization v. Schafer*, 507 U.S. at 1014, 113 S.Ct. at 1669, and by Justice Stevens in *Janklow* call into doubt our prior holding in *Barnes*. On the other hand, the State asks us to follow our previous decision in *Barnes* because the Supreme Court has not conclusively resolved the confusion in this area.

We are free to reconsider the correctness of a panel opinion, short of the full court sitting en banc, if the

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[4] *Compare Compassion in Dying v. Washington*, 79 F.3d 790, 798 n. 9 (9th Cir.1996) (en banc) (holding that *Casey* displaced *Salerno*), cert. granted sub nom. *Washington v. Glucksberg*, ___ U.S. ___, 117 S.Ct. 37, 135 L.Ed.2d 1128 (1996) and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir.1995), *cert. denied sub nom. Janklow v. Planned Parenthood, Sioux Falls Clinic*, ___ U.S. ___, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996) (same) and *Casey v. Planned Parenthood of Southeastern Pa.*, 14 F.3d 848, 863 n. 21 (3d Cir.1994) (on remand) (same) *with Barnes v. Moore*, 970 F.2d at 14 n. 2.

Supreme Court has handed down an intervening decision that implicitly or explicitly overrules one of our prior decisions. *See Federal Deposit Ins. Corp. v. Dawson*, 4 F.3d 1303, 1307 (5th Cir.1993), cert. denied, 512 U.S. 1205, 114 S.Ct. 2673, 129 L.Ed.2d 809 (1994); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 n. 8 (5th Cir.1992). However, we have not held that intermittent statements accompanying denials of certiorari or denials of stays pending appeal amount to an intervening change in the law. The Supreme Court itself has said that "all opinions dissenting from the denial of certiorari" are "totally unnecessary" and "examples of the purest form of dicta." *Singleton v. Commissioner*, 439 U.S. 940, 944-45, 99 S.Ct. 335, 338, 58 L.Ed.2d 335 (1978) (Stevens, J., respecting the denial of certiorari). Accordingly, for a panel of this court to overrule a prior decision, we have required a Supreme Court decision that has been fully heard by the Court and establishes a rule of law inconsistent with our own. See *United States v. Kirk*, 528 F.2d 1057, 1063-64 (5th Cir.1976) (holding that two-member concurrence was insufficient as an indicator that the Court "expressly or implicitly" overruled one of our prior decisions). The wisdom of this policy is illustrated here. As far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire that result.[5]

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[5] The Eighth Circuit boldly declared that the Supreme Court in *Casey* has "effectively overruled *Salerno* for facial challenges to abortion statutes." *Miller*, 63 F.3d at 1458. As we have said, we decline to speculate about the outcome of this disagreement among the Justices of the Supreme Court.

More to the point, even assuming the statements in *Fargo* and *Janklow* amount to an intervening change in the law such that we may decline to follow *Barnes*, we nevertheless stay our hand on this contentious issue because its resolution is not necessary to the disposition of this case, for whether viewed under *Casey* or *Salerno*, Act 1254 is unconstitutional on its face.[6] Thus, like the district court, we apply the more rigorous *Salerno* standard to Act 1254.

IV. THE CONSTITUTIONALITY OF ACT 1254

We now turn to the heart of this appeal – whether Act 1254 comports with the Due Process Clause of the Fourteenth Amendment. We begin with a brief summary of the principles that have shaped this area and guide our decision today.

After the Supreme Court declared in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) that women have a constitutional right to an abortion, the issue of where minors fit into the constitutional picture was soon addressed by the Court. Thus, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Court held that a parental or legal

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[6] We also respectfully decline, for the reasons stated above, Justice Stevens's invitation to reconsider the wisdom of our decision in *Barnes*. *See Janklow*, ___ U.S. at ___ n. 2, 116 S.Ct. at 1583 n. 2 (Stevens, J., mem. respecting the denial of certiorari) ("[I]t is not at all clear to me, given intervening statements by Members of this Court, [citation], that subsequent Fifth Circuit panels would follow *Barnes'* application of the 'no circumstance' test. . . . ").

guardian veto of a minor's choice to have an abortion was unconstitutional. *Id.* at 74-75, 96 S.Ct. at 2843-44. "Constitutional rights," reasoned the *Danforth* Court, "do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* The Court also noted, however, that "the State has somewhat broader authority to regulate the activities of children than adults." *Id.* at 74, 96 S.Ct. at 2843.

Just how far a State can go in restricting a minor's access to abortion was sketched three years later in the seminal decision of *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (*Bellotti II*) (plurality opinion). There, the Court was faced with a challenge to a Massachusetts statute which required a minor under the age of eighteen to obtain parental consent before an abortion could be performed, but if such consent was not given, " 'consent *may* be obtained by order of a judge of the superior court for good cause shown.' " *Id.* at 625, 99 S.Ct. at 3039 (emphasis added). The Massachusetts Supreme Court had interpreted this judicial bypass provision to mean that a minor could not obtain a court order without any parental consent whatsoever. *Id.* at 646, 99 S.Ct. at 3049-50. Thus, in *Bellotti II*, the Court had to determine whether this bypass procedure satisfied the Constitution.

The Court held that it did not. The Court first recognized that parental consent statutes must "provide an alternative procedure" in the event the minor is unable to secure one or both parents' consent. *Id.* at 643, 99 S.Ct. at 3048. Turning next to the Massachusetts bypass provision, the Court concluded that Massachusetts's judicial

bypass procedure "would impose an undue burden upon the exercise by minors of the right to seek an abortion." *Id.* at 647, 99 S.Ct. at 3050. In reaching this conclusion, the Court presented the competing considerations underlying a minor's choice to terminate her pregnancy. The Court recognized that minors are vulnerable, less able than adults to make informed and mature decisions, and that parents play a central role in childrearing. *Id.* at 634, 99 S.Ct. at 3043. Balanced against these concerns, the Court noted, are the battle lines that often develop in families in which one or both parents have strong views about abortion – battle lines that prevent minors from obtaining abortions. Id. at 647, 99 S.Ct. at 3050. With these considerations in mind, the Court specified four constitutional requirements that must be built into parental consent statutes. The Court wrote:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with [3] anonymity and [4] sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Id. at 643-44, 99 S.Ct. at 3048 (footnote omitted); *see also Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 511-14, 110 S.Ct. 2972, 2979-81, 111 L.Ed.2d 405 (1990) (*Akron II*) (presenting the four *Bellotti II* requirements). If

the minor demonstrates that she is mature, well-informed, or that the abortion would be in her best interest, the *Bellotti II* Court held that the bypass decision-maker "*must*" authorize the abortion. *Bellotti II*, 443 U.S. at 647, 648, 99 S.Ct. at 3050, 3050-51 (emphasis added). Because Massachusetts's bypass procedure did not comport with these requirements, the Court declared the statute unconstitutional. *Id.* at 647-48, 99 S.Ct. at 3050-51.

Since *Bellotti II*, lower federal courts have come to the unanimous conclusion that once a minor satisfies the maturity criteria or the best-interest test, bypass decision-makers must order an abortion. We took the lead in *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. Unit B Oct.1981), *overruled on other grounds in Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, where we held that abstention was inappropriate because a Florida bypass procedure presented federal constitutional issues. *Id.* at 481. The relevant statute provided that a court "may" order a minor to have an abortion if she demonstrates that she is sufficiently mature. *Id.* at 478 (quoting Fla. Stat. Ann. § 390.001(4)(a) (West 1981)). In reaching the conclusion that we should not abstain, we reasoned:

> The language of *Bellotti II* is not permissive: "[i]f [the minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must* authorize her to act . . . " [Citation.] Thus, whether permissive or mandatory, subsection 4(a) vests Florida courts with constitutionally impermissible discretion to ignore a minor's maturity in determining whether to authorize her abortion.

Id. at 481 (original emphasis). Other Circuits have read *Bellotti II* in the same way.[7]

Bellotti II, of course, did not answer all of the questions surrounding minors' access to abortion. In fact, the fate of *Bellotti II* was at first unclear because it was decided by a plurality of the Court. Since then, however, the Court has held that *Bellotti II* is controlling precedent, see *Lambert v. Wicklund*, ___ U.S. ___, ___-___, 117 S.Ct. 1169, 1170-71, 137 L.Ed.2d 464 (1997) (Per Curiam); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 898-900, 112 S.Ct. 2791, 2832, 120 L.Ed.2d 674 (1992); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 439-40, 103 S.Ct. 2481, 2497-98, 76 L.Ed.2d 687 (1983) (*Akron I*), and we have not thought otherwise, *Barnes v. Mississippi*, 992 F.2d 1335, 1338-39 (5th Cir.1993); *Scheinberg v. Smith*, 659 F.2d 476, 480-81 (5th Cir. Unit B Oct.1981).[8] The Court has also suggested that absolute

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[7] *See Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1462 (8th Cir.1995) ("If a minor can demonstrate that she is mature, the State has no legitimate reason for imposing liberty restrictions upon her that it may not impose on an adult."), *cert. denied sub nom. Janklow v. Planned Parenthood, Sioux Falls Clinic*, ___ U.S. ___, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1134 (7th Cir.1983) ("The statute does not – and constitutionally cannot – give the juvenile court the authority to refuse to waive notification despite a finding that the minor is mature.").

[8] The State appears to suggest in their brief that *Bellotti II* has been modified by subsequent decisions of the Supreme Court. However, as our discussion suggests, the Court has never questioned the viability of the four *Bellotti II* requirements and we decline to do so in this case. More importantly, the State backed off this claim at oral argument, where it conceded that Act 1254 must be evaluated under *Bellotti II*.

anonymity is not required in bypass proceedings. See *Akron II*, 497 U.S. at 513, 110 S.Ct. at 2980.

With these background principles in mind, we turn next to the specific provisions of Act 1254 to determine whether they comport with *Bellotti II* and its progeny.

A. The Constitutionality of La. R.S. 40:1299.35.5(B)(4) & (6)

Act 1254 changes Louisiana's judicial bypass procedure so that a minor who demonstrates that she is mature, well-informed, or that an abortion would be in her best interest, "may" receive judicial authorization for the abortion. La. R.S. 40:1299.35.5(B)(4), (6). In addition, Act 1254 sets up a state-sponsored "evaluation and counseling" scheme to which a minor may be referred within forty-eight hours of a hearing before the juvenile court. La. R.S. 40:1299.35.5(B)(4). The plaintiffs challenge (B)(4) and (6) on two grounds. First, the plaintiffs claim that (B)(4) and (6) violate the *Bellotti II* principle that mature and well-informed minors and those for whom an abortion is in their best interest *must* receive judicial authorization to have an abortion. Second, the plaintiffs claim that (B)(4)'s requirement that minors receive counseling from state health and social services agencies violates the *Bellotti II* principle that bypass proceedings are to proceed expeditiously. The district court agreed with the plaintiffs on both issues. We discuss each of these holdings in turn.

1. "Shall" versus "May" in § 1299.35.5(B)(4) and (6)

The 1981 version of § 1299.35.5(B) provided that if a minor demonstrates that she is either mature and well-informed or that the abortion would be in her best interest, the juvenile court "shall" order an abortion. La. R.S. 40:1299.35.5(B)(4), (5) (West 1992). As we noted above, this language appeared in Louisiana's judicial bypass statute because of the Supreme Court's decision in *Bellotti II*, which rendered the 1978 version of § 1299.35.5(B) unconstitutional. See *Margaret S.(I)*, 488 F.Supp. at 203. And with, among other things, the addition of the mandatory "shall" language, the 1981 version of § 1299.35.5(B) survived a constitutional challenge. *Margaret S.(II)*, 597 F.Supp. at 650-52.

Against this legislative backdrop, the district court declared § 1299.35.5(B)(4) and (6) unconstitutional. The court looked to the common meaning of the terms "shall" and "may" and concluded that the Louisiana Legislature intended a change in the statutory framework governing the judicial bypass procedure. "[T]he clear intent of the statutory amendment," reasoned the district court, "was to grant the substantive power of discretion to the judges of this state that is directly contrary to the rulings of the Supreme Court in *Casey*, *Akron II* and *Bellotti II*." 905 F.Supp. at 364.

The State in its briefs and at oral argument strenuously asserts that § 1299.35.5(B)(4) and (6) is constitutional because (1) the change from "shall" to "may" does not confer discretion on juvenile court judges to deny a minor an abortion if the minor is mature and well-

informed or if the abortion is in the minor's best interest; and (2) subsections (B)(4) and (6) are procedural in nature and therefore do not contradict the substantive federal law in this area. Neither of these arguments is persuasive.

We reject the State's contention that the change from "shall" to "may" does not confer discretion on juvenile court judges. We note by way of illustration that with one partial exception,[9] Louisiana stands alone on this front: As far as we are aware, every state with a parental consent or notification statute has used the mandatory "shall" language in their bypass schemes.[10] The State's

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[9] North Dakota appears to be the only other state in which a bypass decisionmaker "may" order an abortion if the *Bellotti II* requirements are met. N.D. CENT.CODE § 14-02.1-03.1(5)(a), (b)(1)-(3) (1995). To be sure, unlike Louisiana, part of North Dakota's statutory scheme tracks *Bellotti II*. For example, if a minor in North Dakota demonstrates that she is mature and well informed, § 14-02.1-03.1(5)(a) provides that "the court *shall* issue an order authorizing a competent physician to perform the abortion procedure on the minor." (Emphasis added.) However, if the minor fails to demonstrate she is mature and well informed, § 14-02.1-03.1(5)(b)(1), (3) provides that the court "may" order an abortion if the court determines that the abortion is nevertheless in the minor's best interests. On this point, the North Dakota statute is similar to La. R.S. 40:1299.35.5(B)(6).

[10] *See* Ala.Code § 26-21-4(f)(1), (2) (1996); Ariz.Rev.Stat. Ann. § 36-2152(B) (1996); Ark.Code Ann. § 20-16-804(1)(A), (B) (1995); Cal. Health & Safety Code § 123450(c)(1), (2) (West 1996); 24 Del.Code Ann. § 1784(b) (1995); Ga.Code Ann. § 15-11-114(c)(1), (2) (1996); Ill. Ann. Stat. Ch. 750, para. 70/25(d)(1), (2) (Smith-Hurd 1996); Ind.Code Ann. § 16-34-2-4(d) (West 1996); Kan. Stat. Ann. § 65-6705(e)(1), (2) (1995); Ky.Rev.Stat. Ann. § 311.732(4)(a), (b) (Baldwin 1996); 22 Me.Rev.Stat. Ann. § 1597-A(6)(A)(5), (D)(1)-(2) (West 1995);

argument that subsections (4) and (6) pass constitutional muster takes one of two forms. First, the word change does not on its face give juvenile courts the discretion to deny a minor an abortion if the minor shows that she is mature, well-informed, or that the abortion would be in her best interest; or, alternatively, even though the statute on its face states that a juvenile court judge "may" order an abortion if the *Bellotti II* requirements are met, we should not assume that juvenile court judges will not order an abortion in violation of *Bellotti II*.

The State itself sows the seeds for rejecting the claim that "shall" ostensibly carries the same meaning as "may." In its briefs and at oral argument, the State claims that in determining the constitutionality of § 1299.35.5(B), we should follow Louisiana's rules of statutory construction. When we consider the constitutionality of state statutes, we look to the rules of statutory construction of the state, *see, e.g., Leavitt v. Jane*, ___ U.S. ___, ___-___, 116 S.Ct. 2068, 2069-72, 135 L.Ed.2d 443 (1996) (per curiam); *Barnes v. Mississippi*, 992 F.2d at 1341-42, mindful of the

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Mich. Comp. Laws Ann. § 722.904(3)(a), (b) (West 1996); Minn.Stat. Ann. § 144.343(6)(c)(i) (West 1996); Miss.Code Ann. § 41-41-55(4)(a), (b) (1995); Mo. Ann. Stat. § 188.028(2), (3)(a)-(b) (Vernon 1996); Mont.Code Ann. § 50-20-212(5)(a), (b) (1995); Neb. Rev. Stat. § 71-6903(1) (1995); Nev. Rev. Stat. § 442.2555(3)(a)-(d), (4) (1995); N.C. Gen. Stat. § 90-21.8(e)(1), (2) (1995); Ohio Rev.Code Ann. § 2151.85(C)(1), (2) (Baldwin 1996); 18 Pa. Cons.Stat. Ann. § 3206(c), (d) (1996); R.I. Gen. Laws § 23-4.7-6 (1995); S.C.Code Ann. § 44-41-32(5) (1995); Tenn.Code Ann. § 37-10-304(e)(1), (2) (1996); W. Va.Code § 16-2F-4(f)(1)(2) (1996); Wis. Stat. Ann. § 48.375(7)(c)(1), (2) (West 1996); Wyo. Stat. § 35-6-118(b)(v)(B), (C) (1996).

principle that we should avoid "federal-court nullification of state law," *Leavitt*, ___ U.S. at ___, 116 S.Ct. at 2072, and "[w]here fairly possible, . . . construe a statute to avoid a danger of unconstitutionality," *Ashcroft*, 462 U.S. at 493, 103 S.Ct. at 2526; *Akron II*, 497 U.S. at 514, 110 S.Ct. at 2980-81.

Under Louisiana law, "the paramount consideration for statutory interpretation is the ascertainment of the legislative intent and the reason or reasons which prompted the legislature to enact the law." *Fontenot v. Chevron, U.S.A., Inc.*, 676 So.2d 557, 562 (La.1996). In searching for the legislative intent behind subsections (4) and (6), we begin with Article 9 of the Louisiana Civil Code, which provides:

> When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

La. C.C. art. 9 (West 1996); *Tucker v. Fowler*, 668 So.2d 718, 719 (La.1996); *Marine Marketing Servs., Inc. v. Louisiana Dep't of Ins.*, 673 So.2d 335, 338 (La.Ct.App. 1st Cir.1996) (holding that it was reversible error for trial court to look to statutory intent when the language of the statute was neither ambiguous nor produced absurd consequences). "When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit." La. R.S. 1:4 (West 1996); *Sumrall v. Luhr Bros.*, 665 So.2d 796, 800 (La.Ct.App. 1st Cir.1995), *writ denied*, 669 So.2d 425 (La.1996).

Thus, when determining the Louisiana Legislature's intent behind subsections (4) and (6), we may only go beyond the plain terms of § 1299.35.5(B)(4) and (6) if the statute on its face is unclear or ambiguous or if application of the terms of subsections (4) and (6) produces "absurd consequences." We have found no decisions from the Louisiana courts interpreting the meaning of subsections (B)(4) and (6), no decisions interpreting the pertinent provisions of the 1981 version of § 1299.35.5(B), and no legislative history explaining the 1995 change from "shall" to "may." We therefore apply Louisiana's principles of statutory construction to § 1299.35.5(B)(4) and (6).

We hold that § 1299.35.5(B)(4) and (6) plainly violates *Bellotti II*. As such, the statute is neither unclear nor ambiguous, nor does application of its plain terms produce absurd results. La. R.S. 1:3 (West 1996) provides:

> § 3. Words and phrases; how construed
>
> Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.
>
> The word "shall" is mandatory and the word "may" is permissive.

(emphasis added); *see also* La. C.C. art. 11 (West 1996) ("The words of a law must be given their generally prevailing meaning."); *Backhus v. Transit Cas. Co.*, 549 So.2d 283, 289 (La.1989) (same). We can imagine no more clear

indication that § 1299.35.5(B)(4) and (6) on its face provides juvenile court judges discretion to deny an abortion to a minor who has met the *Bellotti II* requirements. The basic guide for interpreting Louisiana statutes states in unmistakably clear terms that "shall" means "mandatory" and that "may" means "permissive." Moreover, the common usage of the term "permissive" is "[a]llowed; allowable; that which may be done[;][l]enient; tolerant." BLACK'S LAW DICTIONARY at 1140 (6th ed.1990); *Sumrall*, 665 So.2d at 800 (looking to Black's Law Dictionary for common and approved usage). Thus, the plain language of § 1299.35.5(B)(4) and (6) states that juvenile court judges within Louisiana have the discretion to deny an abortion to a minor even though the minor demonstrates that she is mature, well-informed, or that the abortion would be in her best interest. This flies in the face of *Bellotti II* and its progeny.

Our reading of the statute does not produce absurd consequences. We have done nothing more than apply the meaning of "may" and "shall" that exists in La. R.S. 1:3 to a statute that is neither unclear nor ambiguous on its face. Louisiana courts have not declared that this sort of bread-and-butter interpretation of statutes produces "absurd consequences." Compare *Breaux v. Hoffpauir*, 674 So.2d 234, 236 (La.1996) (holding that interpretation of Louisiana statute would lead to absurd consequence because state definition of "actual wages" would be illegal under federal statute); *Washington-St. Tammany Electrical Coop., Inc. v. Louisiana Pub. Serv. Comm'n*, 671 So.2d 908, 914 (La.1996) (absurd consequence results when interpretation contravenes the purposes of the statute).

The State would have us read § 1299.35.5(B) differently. They claim that § 1299.35.5(B) "provides only the procedural means needed for Louisiana state judges to apply the federal substantive principles in this area of law to individual cases in order to issue judgments in accordance with such substantive principles." Because, argues the State, § 1299.35.5(B) is a procedural statute, we must liberally construe the statute to effectuate its overall purposes. Second, the State points to the Louisiana Supreme Court's decision in *Rathborne Lumber & Supply Co. v. Falgout*, 218 La. 629, 50 So.2d 295 (1950), in which the court stated in dictum: "[A]lthough words of a statute are permissive, . . . sometimes they may require an interpretation giving them mandatory effect . . . where the context or subject matter compels such construction or where it is necessary to carry out the clear policy and intention of the Legislature." *Id.* at 635, 50 So.2d 295; *accord Romero v. Stephens*, 359 So.2d 1061, 1065 (La.Ct.App.3d Cir.1978); *Gurtler, Hebert & Co. v. Marquette Casualty Co.*, 145 So.2d 145, 147-48 (La.Ct.App. 4th Cir.1962). But see *Hornsby v. Fidelity Nat'l Bank of Baton Rouge*, 243 So.2d 96, 98 (La.Ct.App. 1st Cir.1971) (declining to follow *Falgout*, adhering to La. R.S. 1:3, and interpreting "may" and "shall" to mean "permissive" and "mandatory," respectively). Thus, concludes the State, we should follow *Falgout* in this case and effectuate the intent of the Louisiana Legislature as expressed in § 1299.35.0 – "It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by decisions of the United States Supreme Court." We reject both arguments.

For us to accept the State's claim that Act 1254 is a procedural statute that merely effectuates the substantive federal law in this area, we would have to conclude that the legislature did not in 1995 intend to change § 1299.35.5(B). In other words, we would have to hold that the change from "shall" to "may" has no bearing on the constitutionality of Act 1254 because Act 1254 does not materially change the 1981 version of § 1299.35.5(B). We cannot accept the State's proposition that Act 1254 does not change the law. First, we would in effect be interpreting the statute so that "may" means "shall," an interpretation that would be flatly inconsistent with the definition of those terms in La. R.S. 1:3. Second, we would be ignoring the Louisiana Supreme Court's understanding of statutory changes. The court has said: "The legislature is presumed to have enacted a statute in light of the preceding statutes involving the same subject matter and court decisions construing those statutes, and where the new statute is worded differently from the preceding statute, the legislature is presumed to have intended to change the law." *New Orleans Rosenbush Claims Serv., Inc. v. City of New Orleans*, 653 So.2d 538, 544 (La.1995) (emphasis added). Nothing the State has said in their briefs or at oral argument persuades us that Act 1254 does not materially change the judicial bypass procedure in Louisiana.

Perhaps the most basic flaw in the State's arguments is the assumption that we must go beyond the plain meaning of § 1299.35.5(B)(4) and (6). We decline to do so because, as we have said, the language of subsections (4) and (6) is clear, unambiguous, and does not produce absurd consequences. The State points us to no authority,

and we perceive none, suggesting that procedural statutes are immune from Article 9's clear mandate. In addition, the State fails to provide any authority, and again we perceive none, for the proposition that *Falgout* is an exception to Article 9's statutory construction principle.

Finally, the State argues that if we interpret § 1299.35.5(B)(4) and (6) to mean that juvenile court judges have the discretion to deny an abortion to a minor that meets the *Bellotti II* requirements, we would be indulging the inappropriate assumption that Louisiana judges will decline to follow the federal Constitution. We agree with the State that we should refrain from assuming that state actors will violate the law. "[T]he Fifth Circuit is not," as we have recognized, "a 'roving commission[ ] assigned to pass judgment on the validity of the Nation's laws.' " *Barnes v. Mississippi*, 992 F.2d at 1342 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973)).

However, we make no such assumption here. We have held that § 1299.35.5(B)(4) and (6) on its face is inconsistent with *Bellotti II* and its progeny because it invests juvenile court judges with the discretion to deny a minor an abortion even though she satisfies the *Bellotti II* requirements. As such, this case is plainly distinguishable from our decision in *Barnes v. Mississippi*, 992 F.2d 1335. There, the plaintiffs brought a facial challenge against a rule promulgated by the Mississippi Supreme Court pursuant to a bypass statute that did not on its face conflict with *Bellotti II*. *Id.* at 1337-41. The Mississippi statute notably provided that if a minor demonstrates that she is mature and well-informed or that the abortion would be in her best interest, the court must order the abortion. *Id.*

at 1342 n. 4. The procedural rule challenged by the plaintiffs, although it was worded differently than the language in *Bellotti II*, did not on its face conflict with the statute. *Id.* at 1341 ("[T]he rule requires a minor to plead that notifying her parents of the abortion is not in her best interest."). Accordingly, we rejected the challenge to the Mississippi Supreme Court's procedural rule on the ground that "[i]f a Mississippi court does follow [the procedural rule] so as to conflict with *Bellotti*, a plaintiff will be free to launch an as-applied challenge to the bypass procedure." *Id.* at 1342.

Here, we face an entirely different situation. Juvenile court judges within Louisiana have a legislatively prescribed choice whether to order an abortion for a minor who is mature, well-informed, or for whom an abortion would be in her best interest. It is this discretion itself, and not the exercise of it, that we find inconsistent with *Bellotti II*.

In short, § 1299.35.5(B)(4) and (6) is unconstitutional. We affirm the district court's decision to permanently enjoin these provisions of Act 1254.

2. Expeditiousness in § 1299.35.5(B)(3) and (4)

Section 1299.35.5(B)(3) provides that "[e]ach application shall be heard in chambers, anonymously, in a summary manner, and within forty-eight hours of the filing thereof." Except for the admonition that the hearing proceed in a "summary manner," subsection (B)(3) on its face does not provide a specific time frame for deciding the merits of a minor's application. Section 1299.35.5(B)(4)

provides that a juvenile court may require a minor to attend various state-sponsored evaluation and counseling sessions within forty-eight hours of the ex parte hearing with the juvenile court judge. Subsection (B)(4), like subsection (3), does not on its face provide a time frame within which that evaluation is to be completed and the results forwarded to the court. Nor does subsection (4) contain the "summary manner" language found in subsection (3).

The plaintiffs claim that § 1299.35.5(B)(3) and (4) violates the *Bellotti II* requirement that bypass procedures proceed expeditiously because both subsections provide an indefinite time period for the juvenile court judge to decide the merits of the minor's application. The district court agreed with the plaintiffs that subsections (B)(3) and (4) did not meet the *Bellotti II* requirement for expeditious resolution of bypass applications. 905 F.Supp. at 365.[11] On appeal, the State argues that the district court erred in reaching this conclusion because the statute requires juvenile court judges to conduct the proceedings in a "summary manner," and to hold that this provision violates *Bellotti II*, we "would have to assume that a state

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[11] The district court stated that "the provisions of Act 1254 *amend Section B(4)* of the Act to require that the juvenile court hear the bypass application within 48 hours, without any requirement as to when the application must be ruled upon." 905 F.Supp. at 365 (emphasis added). Our reading of the statute, however, reveals that subsection B(3) provides the forty-eight hour time frame and that the only change made by Act 1254 was to substitute the word "confidentially" with "anonymously." Act 1254 did not for the first time introduce the forty-eight hour and "summary manner" requirements; both appeared in the 1981 version of § 1299.35.5(B).

district judge would intentionally ignore the requirements of state law and the dictates of the United States Supreme Court."

We agree with the district court that subsections (B)(3) and (4) are inconsistent with *Bellotti II* because they do not provide for an expeditious resolution of the minor's bypass application. We again frame our analysis in accord with Louisiana's rules of statutory construction and determine whether proceeding in a "summary manner" satisfies *Bellotti II*'s expedition requirement. Louisiana Civil Code article 2595 (West 1996) provides that in a summary proceeding, "[t]he court shall render its decision as soon as practicable after the conclusion of the trial of a summary proceeding and, whenever practicable, without taking the matter under advisement." (Emphasis added).

Such an open-ended bypass procedure has never been approved. We should not, as the Supreme Court has suggested, "invalidate[ ] [a bypass] statute on a facial challenge based upon a worst-case analysis that may never occur." *Akron II*, 497 U.S. at 514, 110 S.Ct. at 2981. The Supreme Court has held that a seventeen- and twenty-two-day delay satisfies *Bellotti II*. *Akron II*, 497 U.S. at 514, 110 S.Ct. at 2980-81 (22 days); *Ashcroft*, 462 U.S. at 479 n. 4, 491 n. 16, 103 S.Ct. at 2519 n. 4, 2525 n. 16 (17 days). An indefinite period, however, has been rejected. In *Glick v. McKay*, 937 F.2d 434 (9th Cir.1991),[12]

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[12] The Supreme Court has disapproved the analysis in *Glick*, in which the Ninth Circuit held unconstitutional a bypass procedure which allowed a minor to have an abortion if parental notification, and not the abortion itself, was not in the

the Ninth Circuit determined the constitutionality of the bypass procedure in Nevada's parental notification statute. Like Louisiana's bypass procedure, Nevada's statute did not on its face provide a time frame within which a minor's bypass application was to be decided. *Id* at 438. The Ninth Circuit struck down the statute as inconsistent with *Bellotti II*. "Under the statute," reasoned the court, "the district court could . . . delay the bypass procedure indefinitely. The district court review procedure does not meet the *Bellotti* expediency criterion." *Id.* at 440-41; see also *id.* at 441 n. 4 (stating that "an indefinite period does not" satisfy *Bellotti II*).

Subsections (B)(3) and (4) plainly conflict with *Bellotti II* because the juvenile court is not required to rule on the minor's application within any specified time nor are state counselors required to report back to the juvenile court within any specified time. We hold that "whenever practicable" does not satisfy constitutional standards of expediency. There is no fall-back (or constructive authorization) provision within subsection (3) that deems a minor's application granted in the event the juvenile court does not act within a particular time frame. Thus, not only do subsections (3) and (4) fail to provide any specific time within which a minor's application will be decided, but they give no assurances (assurances required by *Bellotti II*) that the proceedings will conclude expeditiously.

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minor's best interest. *Lambert v. Wicklund*, ___ U.S. at ___-___, 117 S.Ct. at 1170-73. Nothing in *Lambert* affects *Glick's* holding regarding *Bellotti II's* expediency requirement.

The State attempts to rescue subsection (3) by pointing to Article 2591 (West 1961) of the Louisiana Civil Code, which provides: "Summary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings." (Emphasis added). Plainly, the "rapidity" language refers to the expeditiousness of the summary proceeding itself, not to the time a judge has to decide the merits of a case. We inevitably return to article 2595 which does, as we have said, prescribe the time frame within which a decision in a summary proceeding is to be rendered – "as soon as practicable." This is insufficient under *Bellotti II*.

Finally, contrary to the State's contention, we do not portray Louisiana juvenile court judges or state-employed counselors as individuals who would intentionally violate *Bellotti II*, nor are we analyzing the constitutionality of subsections (B)(3) and (4) under a worst-case scenario. We have simply looked to the plain terms of § 1299.35.5(B)(3) and (4) to determine the rules juvenile court judges are required to follow when presented with a bypass application from a minor. The Louisiana Legislature has told them that they must rule on the application "as soon as" or "whenever practicable." This violates *Bellotti II*'s expedition requirement on its face. We therefore affirm the district court's decision to permanently enjoin subsections (3) and (4).

B. The Constitutionality of La. R.S. 40:1299.35.5(B)(5)

Section 1299.35.5(B)(5) provides, among other things, that the juvenile court "shall" notify the parent(s) or legal

guardian if the court determines that such notification is in the minor's best interest. The plaintiffs contend, and the district court agreed, that § 1299.35.5(B)(5) does not satisfy *Bellotti II*'s anonymity requirement. The State, on the other hand, contends that § 1299.35.5(B)(5) comports with *Bellotti II*. The State relies on the following language in *Bellotti II* for this conclusion:

> [T]he court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate.

Bellotti II, 443 U.S. at 648, 99 S.Ct. at 3050-51 (emphasis added). From this statement, the State argues that the *Bellotti II* Court "seem[ed] to encourage [parental notification], if the courts believe to do so is in the minors [sic] best interest." We agree with the district court and conclude that the State is mistaken.

As the plaintiffs and the district court correctly note, this language from *Bellotti II* in no way permits the independent bypass decisionmaker to contact a minor's parents, inform them that their minor daughter is seeking an abortion without their consent, and then ask the parents to participate in the process of deciding whether the abortion would be in the minor's best interest. We read the statement from *Bellotti II* to mean that a Louisiana juvenile court can refuse to authorize a minor's abortion if parental notification is in the minor's best interest, or the court may wait until the minor herself seeks parental consultation, and then, with both the parents' and

minor's input, determine whether an abortion is in the minor's best interest.

Any other interpretation of this language – or shall we say, the State's interpretation – would cut the core out of *Bellotti II*. If *Bellotti II* means anything, it surely means that States seeking to regulate minors' access to abortion must offer a credible bypass procedure, independent of parents or legal guardians, in a parental consent statute like the one in Louisiana. Plainly, the State has attempted to enter through the proverbial back door by suggesting that the "best-interest-of-the-minor" inquiry cannot arbitrarily exclude the input of parents or a legal guardian. Although the Supreme Court has recognized that bypass decisionmakers can consider whether parental notification would be in the best interest of the minor, *Bellotti II*, 443 U.S. at 640, 99 S.Ct. at 3046-47, and that complete anonymity is not required, *Akron II*, 497 U.S. at 513, 110 S.Ct. at 2980, the Court has *not* held that anonymity may give way to parental notification in bypass statutes.

The Supreme Court's decision in *H.L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981) is not to the contrary. There, the Court upheld a parental notification provision, reasoning that "a statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor." *Id.* at 409, 101 S.Ct. at 1171. Because the Court has yet to address the question of whether a bypass procedure is required for parental notification statutes, we do not read *Matheson* to hold that parental notification is an exception to the *Bellotti II* anonymity requirement. Indeed, if we were to agree with the State that *Matheson* modified the anonymity requirement in *Bellotti II*, we would create an

exception that swallows the rule. The central thrust of *Bellotti II* was to ensure that minors who could not or would not seek the consent of a parent or legal guardian have access to a bypass procedure that would ensure anonymity from parents who may "obstruct both an abortion and their access to court." *Bellotti II*, 443 U.S. at 647, 99 S.Ct. at 3050. By requiring a juvenile court judge to notify a minor's parents if the judge finds that doing so would be in the minor's best interest, Louisiana has undermined the independent bypass procedure prescribed in *Bellotti II*.

We affirm the district court's conclusion that subsection (5) of § 1299.35.5(B) is inconsistent with *Bellotti II*'s anonymity requirement.

CONCLUSION

We do not question Louisiana's interest in regulating the circumstances under which minors may obtain abortions or its interest in ensuring that minors make an informed choice to have an abortion. The Supreme Court has stressed, as have we, the need to balance parents' strong interest in participating in a minor's upbringing against a minor's constitutional right to an abortion. Beginning with *Bellotti II*, the Supreme Court has balanced these competing interests in a manner which mandates our decision today. Accordingly, if the Louisiana Legislature chooses to modify its judicial bypass procedure, it must do so consistent with the teachings of the Supreme Court and our Constitution. We hold that Act 1254 is facially unconstitutional under the Due Process Clause of the Fourteenth Amendment of the Constitution.

The summary judgment of the district court permanently enjoining Act 1254 is AFFIRMED.

AFFIRMED.

EMILIO M. GARZA, Circuit Judge, concurring specially:

For the second time in my judicial career, I am forced to follow a Supreme Court opinion I believe to be inimical to the Constitution. *See Sojourner T. v. Edwards*, 974 F.2d 27, 31 (5th Cir.1992) (Garza, J., concurring specially). Although I have misgivings about whether the Act's failure to require expedient decision can support a *facial* challenge under *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), I generally agree with the majority's opinion that certain provisions of Act 1254 are unconstitutional according to the Supreme Court's opinion in *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (*Bellotti II*). I respectfully disagree with the *Bellotti II* Court that the Constitution requires the result we reach today. I do not believe that the language of the Fourteenth Amendment speaks to the discretion judges may exercise in permitting minors to have an abortion. I think that the *Bellotti II* opinion crossed the line from judicial review to judicial legislation. Furthermore, in the absence of governing constitutional text, I believe that ontological issues such as abortion are more properly decided in the political and legislative arenas. Mindful, however, that the Constitution invests the Supreme Court with the final say, I defer to the Court's authority and concur in the majority opinion.

I

My disagreement with the holding of *Bellotti II* begins generally with substantive due process. Although the Supreme Court has assumed that the Fourteenth Amendment has a substantive component, *see Planned Parenthood v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992) (Due Process Clause "has been understood to contain a substantive component"), it has found the boundaries of such substantive rights to be elusive. Nonetheless, courts have extended such protections quite far, as evidenced by the *Bellotti II* opinion, which establishes ambitious and very specific minimum requirements for parental consent statutes in the abortion context.

A

The constitutional mandate of *Bellotti II* springs from a single word used by the drafters of the Civil War amendments: liberty. *Casey*, 505 U.S. at 846, 112 S.Ct. at 2804. The relevant portion of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law. . . . " U.S. Const. amend. XIV. Drafted in the wake of the Civil War, this clause stands as a guarantee against arbitrary action against people by state governments. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986).

"Substantive" due process, as the argument goes, is implicit in this notion. Proponents suggest (or assume) that some government action departs so far from the constitutional scheme that no amount of process will be

sufficient to ratify its legitimacy. See, e.g., *Casey*, 505 U.S. at 846, 112 S.Ct. at 2804; *Daniels*, 474 U.S. at 331, 106 S.Ct. at 665. The Court has "understood" the Fourteenth Amendment to include such guarantees at least as far back as 1887, see *Casey*, 505 U.S. at 846, 112 S.Ct. at 2804 (citing *Mugler v. Kansas*, 123 U.S. 623, 660-61, 8 S.Ct. 273, 291, 31 L.Ed. 205 (1887)) (holding that the Fourteenth Amendment protected brewer from arbitrary deprivation of property), although the Court has probably understood the notion of due process to include a substantive component at least as early as *Dred Scott v. Sanford*, 60 U.S. (How.) 393, 450, 15 L.Ed. 691 (1856) (interpreting the Fifth Amendment to say that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.").

Employing this theory of substantive guarantees, the Supreme Court has read the word "liberty" to create extensive, "fundamental" rights that the state may burden only under the most compelling of circumstances and only in the narrowest of ways. The Court has used the Fourteenth Amendment to constitutionalize such issues as contraception, *Carey v. Population Services Int'l* 431 U.S. 678, 684-85, 97 S.Ct. 2010, 2015-16, 52 L.Ed.2d 675 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 483-86, 85 S.Ct. 1678, 1681-82, 14 L.Ed.2d 510 (1965); municipal housing regulations, *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977) (plurality opinion); child rearing, *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct.

1388, 1394, 71 L.Ed.2d 599 (1982); marriage, *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); school curricula, *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); and, of course, abortion, *Roe v. Wade* 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973). This list is only a partial catalogue of issues, not mentioned anywhere in the Constitution generally or the Fourteenth Amendment specifically, that the Supreme Court has removed from the political arena. The Court's good intentions, expressed in these cases, have slowly eroded the scope of public debate.

I do not believe that we should narrow the scope of procedural protection afforded by the Fifth or Fourteenth Amendments. Nor do I dispute that the Fourteenth Amendment incorporates most of the Bill of Rights. See, e.g., *Casey*, 505 U.S. at 847, 112 S.Ct. at 2804; *Duncan v. Louisiana*, 391 U.S. 145, 147-148, 88 S.Ct. 1444, 1446, 20 L.Ed.2d 491 (1968). However, I think it is a mistake to create new substantive rights, of whole cloth, for every state and for all time, under implicit "penumbras" of a written Constitution; see, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."); through constitutional extrapolation, see id. at 484, 85 S.Ct. at 1682 (holding that contraception, although not mentioned in the Bill of Rights, "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees"); or by mere assumptions, see

Casey, 505 U.S. at 982, 112 S.Ct. at 2875 (Scalia, J., dissenting in part) (" '[R]easoned judgment' does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere 'potentiality of human life.' ").

Perhaps many of the most important substantive due process cases could have been decided under other constitutional provisions, such as the First Amendment. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399-403, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923) (striking down statute that forbade teaching of German in grammar school). Alternatively, some of these issues could have been dealt with by the states – if no extant constitutional provision stood in conflict with these laws, the Court need not have stretched the Fourteenth Amendment to create conflict. State legislatures could have changed laws as public attitudes changed. See, e.g., Conn. Gen.Stat. § 53-32 (1969) (repealing Connecticut laws at issue in *Griswold* prohibiting use of contraceptives). It is a feature of a healthy democracy that evolving public norms find voice in new laws supported by the people.

Some of these judicial decisions, such as invalidating statutes that discriminate based on race, reflect our nation's highest aspirations as an individualist, pluralist society. Nonetheless, judicial officers should not force the pace of change nor bind the nation to wise policy using loose interpretations of our written Constitution. Neither our aspirations about privacy, nor our concerns about the consequences of leaving certain matters for states to decide, invests us with the authority to nullify state law. Article III courts should not cloak political choices with claims that those choices are required by the Due Process

Clause. See *Casey*, 505 U.S. at 983, 112 S.Ct. at 2875 (Scalia, J., dissenting in part).

Currently, the boundaries of substantive due process are less than pellucid. As these unenumerated substantive rights are by their natures not explicit, the Court has understandably had difficulty in fixing their outer perimeter. We have been told by the Court that the limits of due process cannot be reduced to a formula, *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting), and that the doctrine's "boundaries are not susceptible of expression as a simple rule." *Casey*, 505 U.S. at 849, 112 S.Ct. at 2806. The Court has suggested that substantive rights must be so "implicit in the concept of ordered liberty," that "neither liberty nor justice would exist if [they were] sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 151, 152, 82 L.Ed. 288 (1937). It has also said that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851, 112 S.Ct. at 2807. As illustrated by the catalogue of substantive due process rights discussed earlier, the Fourteenth Amendment (thus interpreted) puts quite a bit of public policy within the "heart" of liberty. This is how the Supreme Court has dealt with the admittedly difficult issue of circumscribing which rights and liberties the Fourteenth Amendment comprises.

I do not believe that such open-ended inquiry can be helpful to judges interpreting the Fourteenth Amendment. We must return to those principles embedded in the Constitution. First, as Chief Justice Marshall said in *Marbury v. Madison*, "it is emphatically the province and

duty of the judicial department to say what the law is." 5 U.S. (Cranch) 137, 177, 2 L.Ed. 60 (1803). Importantly, "to say what the law is" presupposes that there is law to interpret. The Constitution does not charge courts with legislation, merely interpretation.

Second, the powers of legislatures are limited, but not by the inherent power of the courts. They are circumscribed by a written constitution: "The powers of the legislature are defined and limited; and that those limits may not be mistaken and forgotten, *the constitution is written.*" *Id.* 5 U.S. at 176 (emphasis added). Indeed, the Framers specifically protected against the combination of legislative and judicial powers in one branch. "The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised by legislative councils. . . . 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would then be the *legislator.*' " The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (quoting Charles Montesquieu, *The Spirit of Laws*, Vol. I, Book IX (1748)).

Third, the people, not the courts, established the Constitution; it is a document of self-determination, not judicial determination. "That *the people* have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected." *Marbury*, 5 U.S. at 176 (emphasis added). In the context of unenumerated constitutional rights, the Supreme Court has constructed a new constitutional amendment out of the single word "liberty."

Instead of interpreting liberty in the context of the Constitution, the Court would have us interpret the Constitution in the context of its broad interpretation of liberty. Viewed expansively, this word can turn the entire Constitution on its head and nullify any restraints on the Court's authority, judicial self-restraint notwithstanding, which the Constitution itself rejects.

Fourth and finally, the Constitution is a flexible and dynamic document, designed to have as much vitality today as it did the day it was written. "This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *M'Culloch v. Maryland*, 17 U.S. (Wheat.) 316, 415, 4 L.Ed. 579 (1819). Although historical circumstances change, the principles that undergird the Constitution do not.

With these principles in mind, we should consider the proper way to interpret the Fourteenth Amendment, and accordingly, the proper scope of substantive due process. As a starting point, an understanding of what constitutional amendments were supposed to mean should guide any attempt to interpret them. The power to amend the Constitution is one of the greatest powers bestowed by the Framers. The power to amend the Constitution gives the people the authority to constrain majorities present and future. Because amendments are so powerful, the Constitution provides a rigorous proposal and ratification procedure for constitutional amendments in Article V, giving special constitutional ratifying authority to the pronouncements of three-fourths of the states. This great authority to bind future generations is seated in the American people. Because

only the drafters and the states have the power to amend, their understanding of the words they choose should govern the courts' interpretations where those words are ambiguous. Courts that stray beyond that meaning are acting beyond their authority. In *Casey*, however, the courts employed no textual analysis or legislative history, only judicial "understandings." *Casey*, 505 U.S. at 846, 112 S.Ct. at 2804.

That is not to say that the Constitution or the Bill of Rights must be frozen in time. As Marshall said in *M'Culloch*, the Constitution is meant to endure, and its application must be flexible. No one would dispute that the First Amendment protects television or the internet, or that the Fourth Amendment protects cellular phones, even though none of these technologies existed in the late eighteenth century. The understanding of the drafters and ratifiers that Congress should not abridge the freedom of the media must guide the courts' application of timeless principles to changed circumstances. In this way, the understandings that undergird the Constitution and its amendments continue to have vitality in areas unforeseen at the drafting.

To say that these understandings are flexible, however, is emphatically not to say that changed values gain constitutional precedence to govern changed circumstances. That is a different proposition altogether. It would be unwise to read the Constitution by reference to a telephone poll, *see Casey*, 505 U.S. at 962, 112 S.Ct. at 2865 (Rehnquist, C.J., dissenting in part); even if it were possible, we have no authority to do so. Article V does not give amendment power to contemporary, majority

viewpoints. It explicitly sets forth a procedure to be followed for amendment.

To date, judicial attempts at understanding the meaning of the Fourteenth Amendment have proven unsatisfactory. Although the Court has held that the Due Process Clause incorporates most of the Bill of Rights against the states, *Duncan v. Louisiana*, 391 U.S. 145, 147-48, 88 S.Ct. 1444, 1446, 20 L.Ed.2d 491 (1968), it has repudiated the notion that the Bill of Rights limits the interpretation of that clause. *See Casey*, 505 U.S. at 847, 112 S.Ct. at 2804-05 (citing disagreement with *Adamson v. California*, 332 U.S. 46, 68-92, 67 S.Ct. 1672, 1683-97, 91 L.Ed. 1903 (1947) (Black, J., dissenting)). The Court has also rejected the idea that the drafters of the Due Process Clause only meant to protect citizens from state actions that were unconstitutional under the Due Process Clause of the Fifth Amendment or proscribed by other law when the Fourteenth Amendment was ratified. Id. (citing disagreement with *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n. 6, 109 S.Ct. 2333, 2344-45 n. 6, 105 L.Ed.2d 91 (1989)).

In his seminal dissent in *Poe v. Ullman* (later adopted by the plurality in *Casey*), Justice Harlan provided a different view of how to interpret the Fourteenth Amendment. Justice Harlan suggested that we consult what "history teaches are the traditions from which [liberty] developed as well as the traditions from which it broke." Justice Harlan does not suggest that we look at the history of the Fourteenth Amendment, but rather to *American history and traditions generally* to determine what liberties have been protected. At first blush, American history might seem to be a good point of reference – a

fixed, knowable tradition from which we might draw understanding. There are two major problems with this approach. First, the traditions from which liberty developed may suggest a different role for government than was actually inscribed into the Fourteenth Amendment. Should the liberty of freed slaves under the Fourteenth Amendment truly have been defined by reference to American history leading up to the Civil War?

The second major difficulty of Justice Harlan's approach is that one can find whatever one seeks in history, if one is so determined. It is certainly true that Justice Harlan's look into American history will produce a richer record from which to draw conclusions. However, to canvas all of American history will likely produce conflicting traditions, allowing those who look to find whatever answers they prefer. See *Michael D.*, 491 U.S. at 137, 109 S.Ct. at 2349 (Brennan, J., dissenting) (Tradition "can be as malleable and as elusive as 'liberty' itself. . . . "); *Moore v. East Cleveland*, 431 U.S. 494, 549, 97 S.Ct. 1932, 1961, 52 L.Ed.2d 531 (1977) (White, J., dissenting) ("What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable.").

The historical approach thus breaks down into the following conundrum: who decides which liberties were recognized in our history? How do we decide which history or tradition is relevant? The task, however, is not to interpret American history, but to interpret the words of the Fourteenth Amendment. The federal judiciary is not composed of historians, merely lawyers whose expertise is neither "history" nor "tradition." As used in *Casey*, concepts such as history and tradition have become

ersatz constitutional provisions that courts substitute for the actual words.

Understanding the meaning of the word "liberty" in the context of the legislative history of the Fourteenth Amendment avoids many of these judicial struggles to determine who gets to define history. Interpreting the Fourteenth Amendment by reference to the understanding of the drafters and ratifiers is an approach more closely targeted to the task of interpreting a written constitution. In fact, that is what the Supreme Court does in almost interpreting all other provisions of the Constitution.

I realize that sometimes legislative history is less clear than the Amendment or statute it is supposed to illuminate, *see, e.g., United States v. Public Utilities Commission*, 345 U.S. 295, 320, 73 S.Ct. 706, 720, 97 L.Ed. 1020 (1953) (Jackson, J., concurring), and Congress often speaks with more than one voice as to why it chose particular language in a statute. *Compare, e.g., TVA v. Hill*, 437 U.S. 153, 173-93, 98 S.Ct. 2279, 2291-2301, 57 L.Ed.2d 117 (1978) (legislative history of Endangered Species Act expresses Congressional intent that Court should enjoin completion of federal dam that would threaten endangered species) with id. at 207-10, 98 S.Ct. at 2308-09 (Powell, J., dissenting) (legislative history of statute supports opposite view) (cited in Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L.Rev. 845, 862 n. 39 (1991)). Indeed, some Amendments and statutes have scarce history to consider. Such difficulties, however, are confronted by courts every day. Perfection in legislative history is not to be expected: I do

not pretend that this judicial task will be easy, only necessary. Fortunately, because the drafters of the Fourteenth Amendment explained in some detail what they meant to accomplish, the legislative history is particularly useful in interpreting the words of the Amendment. *See, e.g., Adamson v. California*, 332 U.S. 46, 92-123, 67 S.Ct. 1672, 1696-1711, 91 L.Ed. 1903 (1947) (appendix to dissent of Black, J., citing extensive legislative history of Fourteenth Amendment in Congress).

The drafters of the Fourteenth Amendment certainly had more modest goals in mind by using the term "liberty" than the modern Supreme Court has. Liberty for the drafters came in the context of dealing with restrictive racial laws in the South. In the floor debates surrounding the drafting of the Fourteenth Amendment, the bill sponsor in the Senate, Senator Trumbull, suggested that the liberty interests involved were intended to deal with these statutes:

> "[S]tatutes of Mississippi . . . provide that if any person of African descent residing in that State travels from one county to the another [sic] without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority. Other provisions of the statute prohibit any negro or mulatto from having fire-arms; and one provision of the statute declares that for 'exercising the functions of a minister of the Gospel free negroes . . . on conviction, may be punished by . . . lashes. . . .' [. . .] The statutes of South Carolina make it a highly penal offense for any person, white or colored, to teach slaves; and similar provisions are to be found running through all the statutes

> of the late slaveholding States. . . . The purpose of the bill . . . is to destroy all these discriminations. . . . "

Adamson, 332 U.S. at 99-100, 67 S.Ct. at 1700 (quoting Cong. Globe, 39th Cong. 1st Sess. 474 (1865)). This does not suggest that the term "liberty" as used in the Fourteenth Amendment applies only to race-conscious statutes, indeed the plain language of the Fourteenth Amendment admits a broader interpretation. However, it does suggest a context in which to decide how to interpret the Amendment consistent with the drafters' intent, a context that was not intended to include abortion.

I recognize that the Supreme Court has not accepted this approach. Indeed, the Court has recently held that such a fixed interpretive guideline is unhelpful in interpreting the Fourteenth Amendment. In *Casey*, the plurality stated that the Court should examine each case as it comes, ad hoc, to determine what substantive rights the Fourteenth Amendment guarantees, using "reasoned judgment." *Casey*, 505 U.S. at 849, 112 S.Ct. at 2806. The power of Article III courts to invalidate state laws under the Constitution is not so expansive – even the reasoned judgment of our wisest jurists cannot replace the written constitution as authority.

Casey best illustrates the approach taken by the Supreme Court. Near the end of the plurality opinion, the Court says that "[e]ach generation must learn anew that the Constitution's written terms embody ideas and aspirations that survive more ages than one." *Casey*, 505 U.S. at 901, 112 S.Ct. at 2833. This is in line with my earlier suggestion that old understandings apply to new situations and that the Constitution is limited by its words.

But that is not what the *Casey* court actually did in the opinion. In deciding whether the abortion regulations at stake fell within the ambit of the Fourteenth Amendment, the court cited Justice Harlan's dissent in *Poe v. Ullman*. Specifically the Court quoted two extensive passages of that opinion. First, the Court asserted that neither the Bill of Rights nor the specific practices of states at the time of the ratification of the Fourteenth Amendment marks the outer limits of substantive due process:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."

Casey, 505 U.S. at 848-49, 112 S.Ct. at 2805 (quoting *Poe*, 367 U.S. at 543, 81 S.Ct. at 1777 (Harlan, J., dissenting on jurisdictional grounds)). The *Casey* Court continued, quoting from *Poe*, that the adjudication of substantive due process claims has traditionally been, and will continue to be, a matter of "reasoned judgment":

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint."

Casey, 505 U.S. at 849-50, 112 S.Ct. at 2806, (quoting *Poe*, 367 U.S. at 542, 81 S.Ct. at 1776 (Harlan, J., dissenting on jurisdictional grounds)). The two block quotes selected by the Court from *Poe* are perhaps more telling for what they omitted, however. For between these two long, lofty (and transposed) quotes in *Poe*, lie two telling sentences. After the above-quoted sentence, "No formula could serve as a substitute, in this area, for judgment and restraint[,]" Justice Harlan continued:

> It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since

> that character must be discerned from a particular provision's larger context. And inasmuch as this context is not one of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.

Poe, 367 U.S. at 543, 81 S.Ct. at 1777 (Harlan, J., dissenting on jurisdictional grounds) (emphasis added). This omitted quote highlights Justice Harlan's approach, employed by the *Casey* Court, of using history and tradition in general, not the written Constitution, to delimit the Fourteenth Amendment. See also *Griswold*, 381 U.S. at 501, 85 S.Ct. at 1691 (Harlan, J., concurring) (rejecting Justice Douglas's restriction of substantive due process to the Bill of Rights and suggesting that judicial restraint may be achieved in the Fourteenth Amendment context "only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.").

The Court is no longer interpreting the words of the Constitution; after *Casey* it is interpreting history. Words such as "rational continuum," "substantial arbitrary impositions," "purposeless restraints," and "balance . . . which our Nation has struck" are code words intended to evoke emotional and rhetorical fealty, yet they have no meaning independent of that given them by five Justices. The people's Constitution – at least as to unenumerated constitutional rights – has become the

Court's Constitution. Those principles most conducive to the people's happiness now come not from the people, but from Platonic guardians. Justice Black has been proven right, arguing in his dissent in *Griswold* against such an ambitious use of the Due Process Clause: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." *Griswold*, 381 U.S. at 526-27, 85 S.Ct. at 1705 (Black, J., dissenting) (quoting Learned Hand, The Bill of Rights 70 (1958)).

As the Supreme Court said in *Bowers v. Hardwick*, "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." 478 U.S. 186, 194, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986). Interestingly, the Court does not even conduct such a historical review in *Casey* to bolster *Roe*'s "doctrinal footing," nor does it accept or refer to the history cited in *Roe* as compelling. See *Casey*, 505 U.S. at 849-50, 112 S.Ct. at 2806.

B

In part because of the Supreme Court's ambiguity about the scope of substantive due process, it is unclear to me that the Court itself still believes that abortion is a "fundamental right" under the Fourteenth Amendment. In the narrow context of this concurrence, I will not canvas the Supreme Court's entire line of abortion cases. For the purposes of this opinion, it is necessary only to point out that the Court's more recent decisions indicate tepid support for *Roe v. Wade*. If *Roe* is no longer the best

interpretation of the Constitution, then our authority to strike the Louisiana statute is very tenuous.

In *Planned Parenthood v. Casey*, the Court in a fractured joint opinion upheld *Roe*'s "central holding," but did not defend *Roe* as a sound reading of the Constitution. 505 U.S. at 860-61, 112 S.Ct. at 2812. Instead, it upheld *Roe* out of concerns for the abstract, nonconstitutional value of *stare decisis*, for the institutional credibility of the Court, and because of the primacy of settled expectations about constitutional law. *Id.* ("Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have. . . . ").

The joint opinion in *Casey* was correct to consider the force of precedent and the value of settled expectations. However, I think that the Court would have been more in line with the Constitution had it given effect to its conclusion that *Roe* is wrong. Where the Constitution is the source of a court's power, it must interpret the Constitution first and consider institutional credibility second. Where, for example, the Court finds that it does not have the *constitutional* authority to strike a state law, its own prior opinions (especially erroneous ones) do not grant that authority, *stare decisis* notwithstanding.

The *Casey* Court asserted that it should not overrule cases, especially cases such as *Roe*, lightly. It explained: "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Casey*, 505 U.S. at 864, 112 S.Ct. at 2813, (citing

Mitchell v. W.T. Grant Co., 416 U.S. 600, 636, 94 S.Ct. 1895, 1914, 40 L.Ed.2d 406 (1974) (Stewart, J., dissenting)); *Mapp v. Ohio*, 367 U.S. 643, 677, 81 S.Ct. 1684, 1703, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting). But these dissents do not impress upon me why the Supreme Court (or any Article III court) should derive the authority to evaluate state laws under its own precedents and not under the best reading of the Constitution. What more should the Court need in order to overrule a prior case than its studied conclusion, based on the words of the Constitution, that the case had been wrongly decided?

Roe and its progeny, including *Bellotti II*, have always stood on precarious constitutional footing for the reasons I indicated in the last section. After *Casey*, these cases may not even be constitutional law. They might best be considered vestigial precedents propped up only by the judicial creation of *stare decisis*.

II

Perhaps because of the difficulties of restricting substantive due process, the Supreme Court assumed what can only be called legislative duties in *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) ("*Bellotti II*"). In *Bellotti II*, the Supreme Court addressed the constitutionality of a Massachusetts statute restricting minors' access to abortion. The *Bellotti II* Court held that minors have the same abortion rights as women who have reached the age of majority, and that the Massachusetts's parental consent law unduly burdened minors' exercise of that right. *Bellotti II*, 443 U.S. at 647, 99 S.Ct. at 3050. But the Court did not stop there. It continued,

stating that the Court's interpretation of the word "liberty" in the Fourteenth Amendment required that, when states seek to regulate minors' access to abortions,

> every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion.

Id. at 647-48, 99 S.Ct. at 3050. The Court thus decided that a minor seeking an abortion without parental consent must be afforded a prompt hearing in court; must be allowed to have an abortion if the court decides she is mature enough to make the decision herself; and must be allowed to proceed if the court determines an abortion is in her best interests. *Id.* Regardless of whether that is good policy, I am not confident that there is a principled way to reach that conclusion from the word "liberty" in the Fourteenth Amendment. By promulgating specific, minimum requirements for state parental consent statutes despite a complete vacuum of Constitutional authority, the Court's opinion in *Bellotti II* has the distinct flavor of judicial legislation.

Bellotti II addresses policy concerns with parental consent statutes, elevates those concerns to constitutional heights, then declares Massachusetts's nonconforming

policy decisions to be unconstitutional. This line of reasoning amounts to little more than a tautology. By positing a fundamental right to abortion and by classifying regulations that jurists deem unwise as an "undue burden" on that right, federal judges risk constitutionalizing their policy preferences regarding any of the catalogue of substantive Fourteenth Amendment rights.

As one might expect, such backward induction yields conflicting and seemingly arbitrary results. For example, we are instructed in *Bellotti II* that parental consent requirements are unconstitutional, 443 U.S. at 649-50, 99 S.Ct. at 3051, yet in *Casey* we are told that the Constitution does not invalidate informed consent requirements, 505 U.S. at 887, 112 S.Ct. at 2826. In *Akron I*, we learn that women have a fundamental right to an abortion that prohibits states from imposing a twenty-four hour waiting period, *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 450, 103 S.Ct. 2481, 2503, 76 L.Ed.2d 687 (1983), while in *Casey* we learn that "liberty" does not prohibit such a twenty-four hour waiting period, 505 U.S. at 885, 112 S.Ct. at 2824 (overruling *Akron I*). The Court's different opinions about the best way to administer a "fundamental right" to abortion may be sensible; on the other hand they may not. But in any event they are not driven by the Constitution.

As illustrated by *Bellotti II*, the due process clause has become a blank check, redeemable for whatever rights the courts fashion. This is no rule of law, and it is certainly not constitutionalism. The Supreme Court's abortion jurisprudence assures us that our panel has authority under the Constitution to strike portions of Louisiana's parental consent statute. But because this jurisprudence

no longer derives its force from the written Constitution, I hesitate to invoke *Bellotti II* to strike this law.

III

Aside from serious concerns about substantive due process, I have a pragmatic objection to courts substituting their judgments about this type of policy question for the decisions of legislatures. As I have asserted before, I think that the modern abortion cases are less about policy than about power. *Sojourner T. v. Edwards*, 974 F.2d 27, 31 (Garza, J., concurring specially) (quoting *Casey*, 505 U.S. at 981, 112 S.Ct. at 2874 (Scalia, J., dissenting in part)). The last two sections have outlined my belief that the Constitution has vested the power to decide these hotly contested, nonconstitutional issues in the state legislatures. See U.S. Const. amend. IX and X. In addition to my beliefs about the constitutional authority of Article III courts, I also think that these issues are better decided over time by democratic, political institutions. *See generally* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L.Rev. 4 (1996) (arguing for narrow judicial decisions in cases involving constitutional and moral uncertainty).

The Supreme Court's abortion jurisprudence epitomizes a trend toward centralizing and constitutionalizing the most controversial issues of public policy. I believe that expanding the jurisdiction and power of the courts in order to speed the pace of change is unjustified. Where the Constitution does not dictate otherwise, the proper mode of political reform is through enlightened debate,

political experimentation, and change. We are a pluralistic nation with strong individualist ideals. One large component of American civic virtue is public debate over issues. To be sure, this requires patience, because self-determination is not a guarantee of correctness the first time or every time. State legislatures will occasionally pass "silly" laws. *See, e.g., Griswold*, 381 U.S. at 527, 85 S.Ct. at 1705 (Stewart, J., dissenting). Some states may be slower than others in coming to what may eventually be a national consensus on an issue. But the ideal is that, through public discourse and experimentation, states will reconsider anachronistic laws, adapt, change, and find the public policies that work best. Where these issues are not constitutional, it demeans the ideal of democracy for the courts to decide these issues for the people, especially under a strained interpretation of the Constitution.

Some have justified an ambitious judicial role in abortion cases by suggesting that the Supreme Court has a special calling to unite the nation in high-stakes cases in which people passionately disagree. In *Casey*, the Court stated that such cases carry a special "dimension" that places those opinions in a class by themselves:

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

Casey, 505 U.S. at 866-67, 112 S.Ct. at 2815. The Court suggested that the two cases exemplifying this call to a common mandate were *Roe v. Wade* and *Brown v. Board of Education*. But as Justice Scalia pointed out in his *Casey* dissent, *Roe* did not settle the political issue of legalized abortion. No one accepted a common mandate in that case. In retrospect, it is clear that the Supreme Court's intervention in the debate clouded the issues, inflaming those who believe that there is no constitutional right to abortion and forcing advocates of legalized abortion to defend abortion "rights" under *Roe*. Today we see that even many of those who believe that abortion should be legal do not support *Roe v. Wade* as faithful interpretation of the Constitution. See *Casey*, 505 U.S. at 860-61, 112 S.Ct. at 2812 (joint opinion reluctantly upholding *Roe* on *stare decisis* grounds); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L.Rev. 375, 385-86 (1985) (criticizing the "[h]eavy handed judicial intervention" of the *Roe* court and suggesting an alternative starting point for analysis in abortion cases).

Roe did not mark the end of the debate or the acceptance of a common mandate, but the beginning of a bitter national exegesis. In this respect, *Roe* is more like *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), than *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*). *Plessy*, like *Roe*, represented an attempt to read into the Constitution one view of history and social policy neither explicit nor fairly implied from the Constitutional text. "Separate but equal" may have been an attempt to solve a contentious

issue of the 1890s, but it was not constitutional interpretation. *Plessy* did not unite the nation behind the idea that segregation was consistent with the Civil War Amendments. As in its abortion cases, the Court occasionally upheld the "central holding" of *Plessy* on *stare decisis* grounds, before finally overruling it in *Brown I*, 347 U.S. at 494-95, 74 S.Ct. at 691-92. I suggest this comparison not necessarily to draw any moral parallel between slavery and abortion, but rather to point out that the Court's insertion of itself as the final arbiter of the abortion debate is unlikely to prove more successful than its attempt in *Plessy*.

Plessy is not the only time our nation has faced a conflict between faithful interpretation and *stare decisis*. We learned the same lesson about ambitious judicial intervention again in the early twentieth century, even in the same substantive due process context, in the line of cases following *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). In *Lochner* and its progeny, the Court established and upheld on *stare decisis* grounds the laissez-faire notion that state regulation of worker health and welfare violated the substantive due process rights of employers in liberty of contract. *See, e.g., Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923). The Court later overruled *Adkins* and signaled the end of the *Lochner* era in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), holding that the Due Process Clause did not contain implicit protections of absolute liberty of contract.

In fact, the very first substantive due process case tells the same story. In *Dred Scott v. Sanford*, 60 U.S. (How.) 393, 450, 15 L.Ed. 691 (1856), the Court held,

among other things, that a slave owner did not lose his property interest in a slave when he traveled with the slave to a free state. In what could be described as the beginning of substantive due process, the Court held that a section of the Missouri Compromise, which would have recognized such slaves as free, was unconstitutional. The Court held that such governmental intrusion on private property rights, regardless of procedural safeguards, "could hardly be dignified with the name of due process of law." Id. This was the first time since *Marbury v. Madison* that the Court used the power of judicial review, and the first time ever that the Court invalidated a statute under judicial review. That a notion as controversial as substantive due process sprang from such a cataclysmic opinion is revealing.

Dred Scott was fashioned as an opinion to put an end to a bitter dispute in America. It took one of the most contentious and personal of political issues out of the national debate. But instead of resolving controversies, *Dred Scott* tore the nation apart. Although *Roe* and its progeny have not resulted in a civil war, the peace over abortion since 1973 has been anything but civil. The last twenty years have seen political protest over the Court's abortion jurisprudence unmatched by any other political issue of our day. Protest marches, clinic bombings, and fatal shootings have punctuated the debate. Putting the lid on this pot has caused it to boil over. Regular debate, lobbying, and legislation at the state level, as contemplated by the Constitution, may diffuse political pressure, relieve tensions, and provide for nuanced answers to hard questions about abortion. Removing such issues from the people prevents their vetting at the local level

and requires the political pressure to be released outside the bounds of civil debate.

In *Dred Scott*, *Plessy*, and *Lochner*, the Court made things worse by inserting itself into, and preempting, the national debate. Although at one time these cases were also defensible on *stare decisis* grounds, they are not celebrated cases in our history. By contrast, the cases in which the Court overruled such precedents, such as *Brown I* and *West Coast Hotel*, are celebrated as constitutional moments. It is of course easier to discern between the two types of cases in retrospect. I think that enough history has passed for us confidently to conclude that *Roe* belongs in the former category, cases in which the Court intervened to settle a national debate by way of expansive constitutional interpretation. It remains for our Supreme Court to write the analog to *West Coast Hotel* extricating itself from the substantive due process morass of abortion cases and returning the debate to the people.

Deliberation about this subject, although heated, is healthy. As a nation, we have not reached a consensus about when life begins; we have not finally determined the proper interplay between a mother's liberty, the interests of an unborn child, and the state's interests in protecting life. At an ontological level, we the people have yet to decide whether person defines life or life defines person. As technology allows fetal independence at an earlier and earlier age, our understanding of these questions will not remain static. The Constitution, in all its prescience, does not answer these questions. Such ontic questions are quintessentially the right of the people to decide. In abortion cases, law presupposes a theory of ethics and morality, which in turn presupposes deeply

personal ideas about being and existence. Our answers to such questions as when life begins define our ethical beliefs, and these ethical beliefs should determine how we govern ourselves. It is a serious mistake to try to reverse this order, to make our law determine how we decide these fundamental, personal, ontic issues. Abortion in this context is less a question about constitutional law, and more about who we are as a people. I submit that this is a decision the Supreme Court cannot make. Liberty is not coextensive with license; it therefore must have limits. Those limits may be imposed only by the people, either in their Constitution or through their laws, not legislated by the courts. Taking these issues out of the public discourse threatens to foment hostility, stifle the search for answers, distance people from their Constitution, and undermine the credibility of that document.

IV

Bellotti II represents a type of legislating that is better left to Congress or the states. In many cases, the courts must fill in gaps in statutes, account for unforeseen circumstances, or decide difficult issues that legislators avoid. However, in this instance, Louisiana actually did exercise its legislative powers; it debated and struggled and made tough choices. Now we are nullifying Louisiana's choice, not under the Constitution, but under *Roe's* continuing authority based on *stare decisis*.

Therefore it is not impertinence that makes me question the Supreme Court's abortion jurisprudence, but institutional modesty. I am uncomfortable invoking the authority of the Constitution to invalidate this statute,

especially under such an ambiguous mandate from the Constitution. Although the Court said in *Bellotti II* that *Roe* and the Fourteenth Amendment set minimum standards for parental consent statutes, it is unclear that the post-*Casey* Supreme Court still believes that the Constitution demands this outcome. Overturning Louisiana's legislature on such thin authority runs dangerously close to anticonstitutional hubris. As Abraham Lincoln said of *Dred Scott*:

> The candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned the government into the hands of that eminent tribunal.

Abraham Lincoln, *First Inaugural Address – Final Text* (Mar. 4, 1861), *in* 4 *The Collected Works of Abraham Lincoln* 262, 268 (Roy P. Basler ed., 1953) (cited in *Casey*, 505 U.S. at 996, 112 S.Ct. at 2882 (Scalia, J., dissenting in part)).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Causeway Medical Suite, and Hope Medical Group For Women, on behalf of themselves and the patients they serve.

v.

RICHARD IEYOUB, Attorney General of the State of Louisiana; Edwin Edwards,Governor of the State of Louisiana; Rose Forrest, Secretary of the Louisiana Department of Health and Hospitals; and Gloria Bryant Banks, Secretary of the Louisiana Department of Social Services, in their official capacities and their successors.

Civil Action
No. 95-2164.

(Filed Aug. 11, 1995)

MEMORANDUM OPINION

LIVAUDAIS, District Judge.

Plaintiffs Causeway Medical Suite and Hope Medical Group for Women move for a preliminary injunction under 42 U.S.C. § 1983, seeking to enjoin enforcement of LSA-R.S. 40:1299.35.5, as amended and re-enacted by House Bill 2458 of the 1995 legislative session. Defendants Louisiana Attorney General Richard Ieyoub, Louisiana Governor Edwin Edwards, Louisiana Secretary of Health and Hospitals Rose Forrest, and Louisiana Secretary of Social Services Gloria Bryant Banks oppose the motion.

LSA-R.S. 40:1299.35.5, ("the Louisiana parental consent law"), as amended and re-enacted by House Bill 2458 of the 1995 legislative session, is scheduled to take effect

on August 15, 1995. On August 10, 1995, after notice was afforded to all interested parties, a hearing was held on plaintiffs' motion for a preliminary injunction. For the following reasons, the motion is granted.

FACTS

LSA-R.S. 40:1299.35.5 is a Louisiana statute that regulates the circumstances under which a woman under the age of 18 can obtain an abortion in the State of Louisiana. Under LSA-R.S. 40:1299.35.5, a physician is prohibited from performing an abortion on a minor without either the consent of one parent or guardian, or an order from a juvenile court judge allowing the abortion. The process for obtaining a court order in lieu of parental consent is called a judicial bypass.

The instant dispute centers on the 1995 amendments to the judicial bypass provision. Prior to the 1995 amendments, the judicial bypass provision stated:

> (4) If the court finds that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court *shall* issue an order authorizing the minor to act on the matter without parental consultation or consent.
>
> (5) If the court finds that the minor is not competent to make the decision concerning the abortion on her own, but finds that the abortion nevertheless would be in the best interest of the minor, the court *shall* issue an order authorizing the abortion.

LSA-R.S. 40:1299.35.5 (B)(4)-(5) (1994) (emphasis added).

The judicial bypass provision of the Louisiana parental consent law had been in effect as written above for more than ten years. The prior version of the Louisiana parental consent law was upheld by this Court in the case of *Margaret S. v. Treen*, 597 F.Supp. 636, 650-52 (E.D. La. 1984), *affirmed on other grounds sub. nom. Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986).

The 1995 amendments to the Louisiana parental consent law change the judicial bypass provision so that it reads as follows:

> (4) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court may issue an order authorizing the minor to act on the matter. Prior to any such order, the court *may* require the minor to participate in an evaluation and counseling session with a mental health professional from the Department of Health and Hospitals, office of mental health, and a staff member from the Department of Social Services, office of community services. The court may refer the petitioner, if necessary, to the appropriate Department of Health and Hospitals, office of mental health regional office to arrange the evaluation and counseling session within forty-eight hours of the ex parte hearing, excluding legal holidays.
>
> (5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court *shall* decide whether or not it would be in the best interest of the minor to

> notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian, the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.
>
> (6) If the court finds that the minor is not competent to make the decision concerning the abortion or that it would not be in the minor's best interest to notify her parents or guardian, the court may issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interest of the minor.

LSA-R.S. 40:1299.35.5 (B)(4)-(6), 1995 (Act 1254) (emphasis added).

Plaintiffs argue that the Louisiana parental consent law must be preliminarily enjoined because the amended judicial bypass provision conflicts with constitutionally required standards for judicial bypass procedures. *See Bellotti v. Baird*, 443 U.S. 622, 642, 99 S.Ct. 3035, 3047 (1979) (*"Bellotti II"*); *see also Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S.Ct. 2972 (1990) (*"Akron II"*); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831 (1976).

The U.S. Supreme Court has decided six cases addressing the constitutionality of parental consent statutes in the abortion context. *See Danforth; Bellotti; Planned Parenthood Assn. of Kansas City, Mo. v. Ashcroft*, 462 U.S.

476, 103 S.Ct. 2517 (1983); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481 (1983) ("*Akron I*"); *Akron II*; *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2868-69 (1992).

A judicial bypass procedure in a parental consent statute must satisfy four criteria. *Akron II*, 110 S.Ct. at 2979 ("The principal opinion in *Bellotti* stated four criteria that a bypass procedure . . . must satisfy."). First, the *Bellotti* decision requires that the bypass procedure allow a minor to demonstrate that she is sufficiently mature and informed to make the abortion decision, in consultation with her physician. *Bellotti*, 99 S.Ct. at 3048.

Second, *Bellotti* requires that even if the minor cannot make the abortion decision by herself, the court must authorize the minor's consent to the abortion if the court determines "the desired abortion would be in her best interests. *Id.* at 3049; *Akron II*, 110 S.Ct. at 2979.

Third, *Bellotti* requires that the bypass procedure preserve the minor's anonymity. *Bellotti*, 99 S.Ct. at 3049. Fourth, *Bellotti* requires that the courts conduct the bypass procedure with expedition "to allow an effective opportunity to obtain the abortion." *Akron II*, 110 S.Ct. at 2980, *citing Bellotti*, 99 S.Ct. at 3049.

After reviewing the memoranda submitted by the parties, the oral arguments presented at the hearing, and the applicable Supreme Court precedent, the Court concludes that a preliminary injunction should be granted because plaintiffs have established: (1) A substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to them

outweighs any damage an injunction might cause defendants; and (4) that the injunction will not undermine the public interest. *Landmark Land Co., Inc. v. OTS*, 990 F.2d 807, 810 (5th Cir. 1993).

Only one prong of the four-part test for a preliminary injunction is seriously disputed here: the substantial likelihood that plaintiffs will succeed on the merits. The Court concludes that plaintiffs have a substantial likelihood of prevailing on the merits of the five basic challenges they make to the amended judicial bypass provision of the Louisiana parental consent law.

First, plaintiffs have a substantial likelihood of succeeding on their argument that subsection (B)(5) of the judicial bypass provision conflicts with the *Bellotti II* requirement of anonymity because it allows a juvenile court to notify the minor's parents or guardian of her desire to obtain an abortion. See *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. at 2979 (upholding Ohio statute as sufficient for preserving minor's anonymity where statute prohibited juvenile court from notifying parents or guardian that minor was pregnant or wanted an abortion).

Second, plaintiffs have a substantial likelihood of succeeding on their argument that subsection (B)(4) does not require sufficient expedition because it contains no time period within which a juvenile court must rule on a minor's application for an order authorizing the abortion.[1]

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[1] *Akron II*, 110 S.Ct. at 2980 (upholding Ohio statute as requiring sufficient expedition where trial court required to

Third, plaintiffs have a substantial likelihood of succeeding on their argument that subsection (B)(4) gives the juvenile court constitutionally impermissible discretion because the statute allows a judge not to grant a petition even where the minor has proven she is mature and well enough informed to make the decision on her own. *See* LSA-R.S. 40:1299.35.5(B)(4)(1995) ("the court *may* issue an order authorizing the minor to act on the matter"; the prior law stated: "the court *shall* issue an order authorizing the minor to act on the matter"). *See Akron II*, 110 S.Ct. at 2979; *Scheinberg v. Smith*, 659 F.2d 476, 481 (5th Cir. 1981), *overruled on other grounds Casey*, 112 S.Ct. 2791 (1992).

Fourth, plaintiffs have a substantial likelihood of succeeding on their argument that subsection (B)(4)'s provision for mental health counseling does not require sufficient expedition because it contains no time period within which the counseling sessions are to actually take place or be completed.[2]

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render a decision within five days after minor files complaint); *Ashcroft*, 103 S.Ct. at 2519, n.4, 2525, n.16 (upholding Missouri statute requiring a decision within 17 calendar days plus sufficient time for deliberation and decisionmaking at trial and appellate court); *Barnes v. Mississippi*, 992 F.2d 1335, 1337 (5th Cir.), cert. denied 114 S.Ct. 468 (1993) (upholding Mississippi statute requiring judicial bypass applications to be decided within 72 hours of filing); *Glick v. McKay*, 937 F.2d 434, 440-41 (9th Cir. 1991 (striking down Nevada parental consent statute where the judicial bypass procedure contained no time period within which state court must rule upon minor's petition.)

[2] *Akron II*, 110 S.Ct. at 2980 (upholding Ohio statute as requiring sufficient expedition where trial court required to render a decision within five days after minor files complaint);

Fifth, plaintiffs have a substantial likelihood of succeeding on their argument that subsection (B)(6) gives the juvenile court constitutionally impermissible discretion because the statute allows a juvenile court not to grant an application where the court finds an abortion would be in the best interest of a minor not competent to make the decision on her own. *See* LSA-R.S. 40:1299.35.5(B)(6) (1995) ("the court *may* issue an order authorizing the minor to act on the matter"; the prior law stated: "the court *shall* issue an order authorizing the minor to act on the matter"). *See Akron II*, 110 S.Ct. at 2979; *Scheinberg*, 659 F.2d at 481, *overruled on other grounds Casey*, 112 S.Ct. 2791 (1992).

Accordingly, the Court concludes that plaintiffs have a substantial likelihood of success on the merits. Furthermore, the Court finds that minors will suffer a substantial threat of irreparable injury because the amended statute may place constitutionally impermissible burdens on a minor seeking to obtain an abortion. The substantial threat posed to minors by this burden outweighs any damage a preliminary injunction might cause defendants. Thus, the Court concludes that a preliminary injunction will not undermine the public interest.

Because plaintiffs have a substantial likelihood of proving the judicial bypass provision of the amended statute conflicts with the *Bellotti II* standards, the Court finds that the entire statute must be enjoined because a

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Ashcroft, 103 S.Ct. at 2519, n.4, 2525, n.16 (upholding Missouri statute requiring a decision within 17 calendar days plus sufficient time for deliberation and decisionmaking at trial and appellate court).

parental consent provision, standing alone, is clearly unconstitutional. *Danforth*, 96 S.Ct. at 2843 (a State must provide some sort of bypass procedure if it elects to require parental consent).

Accordingly,

The Court will grant a preliminary injunction prohibiting defendants from enforcing LSA-R.S. 40:1299.35.5, as amended and re-enacted by House Bill 2458, in its entirety.

ORDER

Considering the plaintiffs' motion for preliminary injunction, the memoranda and oral argument of counsel, the record and the law, and for the reasons assigned,

IT IS ORDERED that the preliminary injunction applied for herein enjoining enforcement of LSA-R.S. 40:1299.35.5, as amended and re-enacted by House Bill No. 2458 of the 1995 legislative session, be and is hereby GRANTED for the pendency of the proceedings before this Court.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAUSEWAY MEDICAL SUITE, and HOPE MEDICAL GROUP FOR WOMEN on behalf of themselves and the patients they serve.

vs.

RICHARD IEYOUB, Attorney General of the State of Louisiana; EDWIN EDWARDS, Governor of the State of Louisiana; ROSE FORREST, Secretary of the Louisiana Department of Health and Hospitals; and GLORIA BRYANT BANKS, Secretary of the Louisiana Department of Social Services, in their official capacities and their successors.

Civil Action
No. 95-2164
Section: E/3

(Filed August 14, 1995)

ADDENDUM TO AUGUST 11, 1995 ORDER GRANTING PRELIMINARY INJUNCTION (RECORD DOCUMENT 13)

IT IS FURTHER ORDERED that this ruling, and the Court's reasons therefor, shall not be construed or interpreted in any manner whatsoever as preliminarily enjoining defendants from applying and/or enforcing LSA-R.S. 40:1299.35.5 relative to procedures applicable to minors seeking abortions in existence prior to the 1995 Regular Session of the Louisiana Legislature. To the contrary, this order applies only to, and only preliminarily enjoins application and/or enforcement of House Bill 2458 (Act

1254) of the 1995 Regular Session of the Louisiana Legislature as it purports to make changes in certain provisions of the existing LSA-R.S. 40:1299.35.5, which shall remain intact and effective during the pendency of these proceedings.

New Orleans, Louisiana, August 14, 1995.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAUSEWAY MEDICAL SUITE, and HOPE MEDICAL GROUP FOR WOMEN on behalf of themselves and the patients they serve.

Civil Action No. 95-2164 Section: E/3

vs.

RICHARD IEYOUB, Attorney General of the State of Louisiana; EDWIN EDWARDS, Governor of the State of Louisiana; ROSE FORREST, Secretary of the Louisiana Department of Health and Hospitals; and GLORIA BRYANT BANKS, Secretary of the Louisiana Department of Social Services, in their official capacities and their successors.

(Filed Oct. 24, 1995)

RULING ON MOTIONS FOR SUMMARY JUDGMENT

LIVAUDAIS, District Judge.

Before the court are cross motions for summary judgment submitted by both parties. Plaintiffs, Causeway Medical Suite and Hope Medical Group for Women, move for summary judgment under 42 U.S.C. § 1983, seeking to permanently enjoin enforcement of LSA-R.S. 40:1299.35.5, as amended and re-enacted by House Bill 2458 (Act 1254) of the 1995 Louisiana legislative session. Defendants, Louisiana Attorney General Richard Ieyoub, Louisiana Governor Edwin Edwards, Louisiana Secretary

of Health and Hospitals Rose Forrest, and Louisiana Secretary of Social Services Gloria Bryant Banks, oppose the plaintiffs' motion and move for summary judgment dismissing the claim. Two briefs were also filed *Amicus Curiae*. In support of the plaintiffs' motion, the American Civil Liberties Union Foundation of Louisiana filed an Amicus brief. Louisiana Lawyers for Life filed a brief in support of the defendants. For the following reasons, the plaintiffs' motion for summary judgment is granted and the enforcement of LSA R.S. 40:1299.35.5, as amended and re-enacted by Act 1254 (House Bill 2358) of the 1995 Legislative session, is permanently enjoined. The defendants' motion is denied for the same reasons.

FACTS

LSA-R.S. 40:1299.35.5 is a Louisiana statute that regulates the circumstances under which a woman under the age of 18 can obtain an abortion in the State of Louisiana. Under LSA-R.S. 40:1299.35.5, a physician is prohibited from performing an abortion on a minor without either the consent of one parent or guardian, or an order from a juvenile court judge allowing the abortion. The process for obtaining a court order in lieu of parental consent is called a judicial bypass.

The instant dispute centers on the 1995 amendments to the judicial bypass provision. Prior to the 1995 amendments, the judicial bypass provision stated:

(4) If the court finds that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court *shall* issue

an order authorizing the minor to act on the matter without parental consultation or consent.

(5) If the court finds that the minor is not competent to make the decision concerning the abortion on her own, but finds that the abortion nevertheless would be in the best interest of the minor, the court *shall* issue an order authorizing the abortion.

LSA-R.S. 40:1299.35.5(A) and (B)(4)-(5) (1994) (emphasis added).

The judicial bypass provision of LSA-R.S. 40:1299.35.5 ("the Louisiana parental consent law") had been in effect as written above for more than ten years. The prior version of the Louisiana parental consent law was upheld by this Court in the case of *Margaret S. v. Treen*, 597 F.Supp. 636, 650-52 (E.D.La.1984), *affirmed on other grounds sub. nom. Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir.1986).

The 1995 amendments to the Louisiana parental consent law change the judicial bypass provision so that it reads as follows:

(4) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court *may* issue an order authorizing the minor to act on the matter. Prior to any such order, the court may require the minor to participate in an evaluation and counseling session with a mental health professional from the Department of Health and Hospitals, office of mental health, and a staff member from the

Department of Social Services, office of community services. The court may refer the petitioner, if necessary, to the appropriate Department of Health and Hospitals, office of mental health regional office to arrange the evaluation and counseling session within forty-eight hours of the ex parte hearing, excluding legal holidays.

(5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court *shall* decide whether or not it would be in the best interest of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian, the court *shall* so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.

(6) If the court finds that the minor is not competent to make the decision concerning the abortion or that it would not be in the minor's best interest to notify her parents or guardian, the court *may* issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interest of the minor.

LSA-R.S. 40:1299.35.5(B)(4)-(6), 1995 La.Sess.Law.Serv. Act 1254 (H.B. 2458) (West) (emphasis added).

This court issued a preliminary injunction to the enforcement of LSA-R.S. 40:1299.35.5, as amended by Act 1254 of the 1995 legislative session, on August 11, 1995.

Following that decision, the parties requested a clarification as to the status of the law following the preliminary injunction. On August 14, 1995, this court issued an Addendum to its prior ruling stating that the preliminary injunction had the effect of maintaining the status of LSA R.S. 40:1299.35.5 as it existed prior to the 1995 legislative session. Plaintiff moved for reconsideration of that ruling, but has now withdrawn that motion.

DISCUSSION:

I.

Both parties have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In opposing a properly supported motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of [its] pleadings, but the [non-moving] party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In determining the existence of a genuine issue for trial, a court must view the evidence in the light most favorable to the non-movant, and any reasonable doubt as to the

existence of a genuine issue must be resolved in favor of the nonmoving party.

As the present case is a facial challenge to the constitutionality of a legislative act, by definition no factual questions as to the application of the law are in dispute. In fact, the only factual dispute involves the standing of the plaintiffs to bring this action. However, it is clear from the recent decisions of the Supreme Court that providers of abortion services do have standing to assert the claims relative to the right of their patients to choose to have an abortion. *Planned Parenthood v. Casey*, 505 U.S. 833, 843-44, 112 S.Ct. 2791, 2803, 120 L.Ed.2d 674 (1992).[1] Both the plaintiffs have established by credible evidence that they are providers of abortion services and that a sizable percentage of their patrons are minors. As a result of the lack of factual controversy, subject to the standing issue discussed above, this court has limited its consideration to only legal issues.

II.

In a challenge to the facial constitutionality of a legislative act, the plaintiffs must establish that no set of circumstances exists under which the act would be valid. *Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir.1992) (Citing

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[1] Defendants also claim that this court lacks jurisdiction to hear this case as a "collateral attack on state court procedures, valid on their face, aimed a [sic] private cases." (Defendants Motion for Summary Judgment, p. 30). Clearly this court does have jurisdiction pursuant to 28 U.S.C.A. § 1343 as this suit seeks to redress the deprivation, under color of state law, of a right secured by the Constitution of the United States.

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)).[2] While this is an extremely difficult standard to meet, in the present case, the 1995 amendment to LSA-R.S. 40:1299.35.5 clearly violates the constitutional protections and rights of all minors seeking judicial bypass of the parental consent requirement to

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[2] Presently the Federal Circuit Courts are split on the issue of whether this standard was changed by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. F [sic] 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). In *Casey*, the majority appeared to have found that an abortion law is unconstitutional on its face if in a large fraction of the cases in which the law is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. *Id.* at 895, 112 S.Ct. at 2830. In fact, Justice O'Connor, the author of the Casey decision, has subsequently written that the case "made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if in a large fraction of cases in which it is relevant it will operate as a substantial obstacle to a woman's choice . . . " *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, ___, 113 S.Ct. 1668, 1669, 123 L.Ed.2d 285 (1993) (Concurring Opinion). This new standard has been accepted by several circuits, including the Third, Eighth and Ninth Circuits. *See Casey v. Planned Parenthood*, 14 F.3d 848, 863 n. 21 (3rd Cir.1994) (on remand); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1457 (8th Cir.1995); and, *Compassion in Dying v. Washington*, 49 F.3d 586, 590 (9th Cir.1994).

However, the Fifth Circuit has refused to accept that the longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes was changed, *sub silentio*, in *Casey*. *Barnes v. Moore*, 970 F.2d 12, 14 n. 2 (5th Cir.1992). As such, the Fifth Circuit continues to apply the strict *Salerno* standard.

In the present case, this distinction makes little difference as the Louisiana Statute at issue is defective under either standard. As such, this Court offers no view as to which is the appropriate standard.

obtain an abortion as established by the Supreme Court in *Bellotti II* (*Infra*) and most recently affirmed in *Casey* (*Infra*).

In *Casey*, the Supreme Court stated that "[w]e have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id.* 505 U.S. at 899, 112 S.Ct. at 2832. (Citing *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (hereafter *Akron II*) and *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (hereafter *Bellotti II*).

A judicial bypass procedure in a parental consent statute must satisfy four criteria. *Akron II*, 497 U.S. at 511, 110 S.Ct. at 2979 ("The principal opinion in *Bellotti* stated four criteria that a bypass procedure . . . must satisfy."). First, the *Bellotti* decision requires that the bypass procedure allow a minor to demonstrate that she is sufficiently mature and informed to make the abortion decision, in consultation with her physician. *Bellotti II*, 443 U.S. at 643, 99 S.Ct. at 3048. Second, *Bellotti* requires that even if the minor cannot make the abortion decision by herself, the court must authorize the minor's consent to the abortion if the court determines "the desired abortion would be in her best interests." *Id.* at 645, 99 S.Ct. at 3049; *Akron II*, 497 U.S. at 511, 110 S.Ct. at 2979.

Third, *Bellotti* requires that the bypass procedure preserve the minor's anonymity. *Bellotti II*, 443 U.S. at 643, 99 S.Ct. at 3049; *Akron II*, 497 U.S. at 511, 110 S.Ct. at 2979 (upholding Ohio statute as sufficient for preserving

minor's anonymity where statute prohibited juvenile court from notifying parents or guardian that minor was pregnant or wanted an abortion).

Fourth, *Bellotti* requires that the courts conduct the bypass procedure with expedition "to allow an effective opportunity to obtain the abortion." *Akron II*, 497 U.S. at 512, 110 S.Ct. at 2980, *citing Bellotti II*, 443 U.S. at 644, 99 S.Ct. at 3049.

The revisions of LSA-R.S. 1299.35.5(B) contained in Act 1254 directly conflict with the *Bellotti II* standards in several respects:

First, the Amendment to Section B(4), by substituting "may" for "shall", has the effect of conferring upon the juvenile court judge the discretion to deny a judicial bypass to a minor who had shown herself to be sufficiently mature and informed to make an intelligent decision on the merits of obtaining an abortion.

The Supreme Court has specifically prescribed the scope of inquiry allowed by the Constitution in the determination of whether a minor should be able to have access to an abortion without parental consent. *See, Bellotti II*, at 644, 99 S.Ct. at 3050. While the court left open the exact factors to be used in the determination of the minor's maturity, it specifically stated that "[i]f she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *MUST* authorize her to act without parental consultation or consent." *Id.* at 644, 99 S.Ct. at 3050. (emphasis added) This clearly establishes the substantive standard and requirements of a judicial bypass.

The Fifth Circuit has specifically ruled on this issue in *Scheinberg v. Smith*, 659 F.2d 476, 481 (5th Cir.1981), *overruled on other grounds Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). In *Scheinberg*, a Florida statute was struck down for vesting in the state courts the same discretion granted by Act 1254 to ignore a minor's maturity in determining whether to authorize an abortion. The statute was found to be contrary to the standards set out in *Bellotti II* in that it permitted judicial authorization for an abortion to be withheld from a minor who is found by the court to be mature enough to make the decision independently. *Id.* at 480, citing *Bellotti II*, 443 U.S. at 645, 99 S.Ct. at 3052.

The defendants maintain that this change in statutory language from "shall" to "may" did not grant this discretion but merely provided the procedural means needed for the state judges to apply the federal substantive principles. (Defendants' Brief pg. 10-11). However, as the defendants themselves state, courts must interpret statutory language in ways to effect the purpose for which it was enacted. (Def.Brf. at 10.) As one of the main changes in the Act is to replace "shall" with "may", the legislature must have intended this to effectuate some change in the law. In *Backhus v. Transit Cas. Co.*, 549 So.2d 283, 289 (La.1989), a case cited by the defendants, the Louisiana Supreme Court stated that, under the Louisiana Code, a court must give words of a law their generally prevailing meaning. *Id.* at 289. In the present case, the generally prevailing meaning of "may" is a grant of discretion, while the generally prevailing meaning of "shall" is a mandate to act. As such, the clear intent of the statutory

amendment was to grant the substantive power of discretion to the judges of this state that is directly contrary to the rulings of the Supreme Court in *Casey*, *Akron II* and *Bellotti II*. As the court stated in *Bellotti II*, "[w]e are concerned here with the exercise of a constitutional right of unique character. . . . [I]f the minor satisfied a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently." *Bellotti II*, 443 U.S. at 645, 99 S.Ct. at 3052.[3]

Secondly, the provisions of Act 1254 amend Section B(4) of the Act to require that the juvenile court hear the bypass application within 48 hours, without any requirement as to when the application must be ruled upon. This is clearly contrary to the requirement from *Bellotti II* of an expeditious determination of the application sufficient to allow an effective opportunity to obtain the abortion. *Bellotti II*, at 644, 99 S.Ct. at 3049. While the Supreme Court has upheld statutes that require up to 22-days, even in worst case scenarios, for a decision on the application, in the present case there is no maximum allowed time period for rendering the decision on the application.

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[3] The Act also amended LSA-R.S. 40:1299.35.5 by adding Sec. B(6). This amendment suffers from the same deficiency as B(4) of granting the state juvenile court judge discretion to deny a judicial bypass authorization to an immature minor who has adequately demonstrated that the abortion would be in her best interest. This provision is also contrary to the established Supreme Court precedent. See *Bellotti II*, 443 U.S. at 644, 99 S.Ct. at 3050 ("If the court is satisfied that [an abortion is in her best interest] the court *must* authorize the abortion.") (emphasis added)

See *Akron II*, 497 U.S. 502, 513, 110 S.Ct. 2972, 2980, 111 L.Ed.2d 405 (1990).

Defendants argue that, under the Louisiana Code of Civil Procedure, the statute is not constitutionally insufficient as the courts are required to conduct these proceedings as "summary proceedings". However, as the defendant admits, La.C.C.P. Article 2595 only requires that in summary proceedings the court "render its decision as soon as *practicable* after the conclusion of the trial and, whenever *practicable*, without taking the matter under advisement." (emphasis added) This vague timeframe is insufficient to protect the rights of the minor, especially considering the time sensitive nature of the availability of an abortion. As the Ninth Circuit held in *Glick v. McKay*, 937 F.2d 434, 440-441 n. 4 (9th Cir.1991), "[w]hile a seventeen or twenty-two day bypass procedure period satisfies the *Bellotti* requirement that the courts must conduct a bypass procedure with expediency to allow the minor an effective opportunity to obtain an abortion, an indefinite period does not." (Citing *Akron II*, 497 U.S. at 513, 110 S.Ct. at 2980; *Bellotti II*, 443 U.S. at 643, 99 S.Ct. at 3048.)

Further, under Section B(4), the court may require the minor to participate in an evaluation and counseling session with a mental health professional from one or more of several state agencies prior to any order authorizing the bypass. Again, there is a 48 hour period to order the evaluation, but no timeframe is given for its completion. Considering the often glacial pace of agency decision making, this constitutes a manifest threat and undue burden to the availability of the judicial bypass to mature minors.

As stated above, the provisions of the judicial bypass must assure that the decision of the court to grant or deny the application must be completed with expedition to allow an effective opportunity to obtain the abortion. *Akron II*, 497 U.S. at 513, 110 S.Ct. at 2980, *citing Bellotti II*, 443 U.S. at 644, 99 S.Ct. at 3049. In a situation where time is of the essence, these vague and open-ended directives are insufficient to protect the minor's right to a timely resolution on her judicial bypass application. Act 1254 does not meet the minimum requirement of expedition as no maximum period is given in which the court must approve or deny an application for judicial bypass, therefore in each and every application by a pregnant minor for a judicial bypass authorization, there is no assurance under the Act that the decision will be made expeditiously.

Finally, Act 1254 disregards yet another of the *Bellotti* mandates by requiring that the juvenile court notify the parents of immature minors who have applied for judicial bypass if it is determined to be in the best interest of the minor to do so. LSA-R.S. 40:1299.35.5(B)(5) (as amended by Act 1254). In *Bellotti II*, the court did state that there is a substantial state interest in encouraging parental involvement, however it specifically denied the courts the ability to breach the anonymity of the minors bypass application. *Bellotti II*, 443 U.S. at 644-45, 99 S.Ct. at 3050-3051. The Court limited the role of the state juvenile courts, even when notification would be in the best interest of the minor, to deferring decision until after parental consultation, specifically stating that "this is the full extent to which parental involvement may be required." *Id.* at 645, 99 S.Ct. at 3051. Thus, while the juvenile court

may deny the application if it determines that parental notification would be in the best interest of an immature minor, it may not take any action to notify the parents itself. *Id.*

In this light, the requirement of Act 1254 that "if the court finds that it is in the minor's best interest to notify her parent or guardian, the court *shall* so notify and reconvene the proceeding within 48 hours . . . " LSA-R.S. 40:1299.35.5(B)(5) (as amended by Act 1254) directly violates the right to anonymity of the minor in making the judicial bypass application. Not only are the courts of Louisiana authorized to notify the parents under the Act, they are required to do so. This clearly violates the right established in *Bellotti II*, as upheld in *Akron II* and *Casey*, of a minor to an anonymous application for judicial bypass.

In sum, the provisions of LSA R.S. 40:1299.35.5(B)(4)-(6) (as amended by Act 1254) violate all four of the requirements for a judicial bypass provision established by the Supreme Court in *Bellotti II*, 443 U.S. at 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) and subsequently upheld in a litany of cases including *Akron II*, 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) and, most recently, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). As such, Act 1254 constitutes an undue burden on the right of minors to have access to abortion services by way of a judicial bypass of the parental consent requirement and thus violates the Due Process clause of the Fourteenth Amendment.

III.

To be entitled to a permanent injunction for a constitutional violation, a plaintiff must show (1) that there has been such a violation, (2) the existence of continuing irreparable injury if the injunction does not issue, and (3) the lack of an adequate remedy at law. *Dye v. McKeithen*, 856 F.Supp. 303, 305 (W.D.La.1994) citing *Newman v. State of Alabama*, 683 F.2d 1312, 1319 (11th Cir.1982), *cert. den.*, 460 U.S. 1083, 103 S.Ct. 1773, 76 L.Ed.2d 346 (1983). For the reasons stated above, this Court finds that the amendments to LSA-R.S. 40:1299.35.5 contained in Act 1254 (H.B. 2458) are facially unconstitutional under the Supreme Court's interpretation of the 14th Amendment in *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), as affirmed in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Further, this Court finds that the plaintiffs have proven continuing irreparable injury if the injunction does not issue, and under the facts of the case the plaintiffs have no other adequate remedy at law aside from institution this suit pursuant to 42 U.S.C.A. § 1983. Thus this Court finds that the permanent injunction herein requested by plaintiffs would prevent irreparable injury to those represented by the plaintiffs, not unduly damage the defendants, and be in the best interest of the public.

Accordingly,

IT IS HEREBY ORDERED that the motion for summary judgment of the plaintiffs, Causeway Medical Suite and Hope Medical Group for Women, is hereby GRANTED.

IT IS FURTHER ORDERED that the motion for summary judgment of the defendants is hereby DENIED.

JUDGMENT

Considering the record, the ruling on the motions for summary judgment entered this date, the law and for the reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED that the August 11, 1995 Order of the Court and the August 14, 1995 Addendum thereto be **RECALLED** and **VACATED**, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of the plaintiffs, Causeway Medical Suite and Hope Medical Group for Women, and against defendants, Richard Ieyoub, Edwin Edwards, Rose Forrest, and Gloria Bryant Banks, **PERMANENTLY ENJOINING** the enforcement of House Bill 2458 (Act 1254) of the 1995 Louisiana legislative session as it purports to amend LSA-R.S. 40:1299.35.5.

/s/ Marcel Livaudais, Jr.
Marcel Livaudais, Jr.
United States
District Judge

APPENDIX E

LOUISIANA STATUTORY PROVISIONS

1. Louisiana Revised Statutes Title 40, Section 1299.35.0 (La. R.S. 40:1299.35.0)

§ 1299.35.0. Legislative intent

It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.

2. Louisiana Revised Statutes Title 40, Section 1299.35.1 (La.R.S. 40:1299.35.1)

§ 1299.35.1. Definitions

As used in R.S. 40:1299.35.0 through 40:1299.35.18, the following words have the following meanings:

(1) "Abortion" means the deliberate termination of a human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead unborn child caused by a spontaneous abortion.

(2) "Unborn child" means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy.

(3) "Viable" means potentially able to live outside of the womb of the mother upon premature birth whether resulting from natural causes or an abortion, or otherwise, and whether that potentiality exists in part due to the provision or availability of natural or artificial life-support systems.

(4) "Conception" means the fertilization of a human female ovum by the sperm of a human male.

(5) "Physician" means a person licensed to practice medicine in the state of Louisiana.

3. La.R.S. 40:1299.35.5 as it existed prior to the enactment of Act 1254 of the 1995 Regular Session of the Louisiana Legislature.

§ 1299.35.5. Minors

A. No physician shall perform or induce an abortion upon any pregnant woman who is under the age of eighteen years and who is not emancipated judicially or by marriage unless the physician has received one of the following documents:

(1) A notarized statement signed by the mother, father, legal guardian, or tutor of the minor declaring that the affiant has been informed that the minor intends to seek an abortion and that the affiant consents to the abortion.

(2) A court order as provided in Subsection B of this Section.

B. The following provisions shall apply to all applications for court orders by minors seeking abortions and appeals from denials of applications:

(1) Jurisdiction to hear applications shall be in the court having juvenile jurisdiction in the parish where the abortion is to be performed or the parish in which the minor is domiciled.

(2) Each clerk of each court which has jurisdiction to hear such applications shall prepare application forms in clear and concise language which shall provide step by step instructions for filling out and filing the application forms. All application forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the application forms.

(3) Each application shall be heard in chambers, confidentially, in a summary manner, and within forty-eight hours of the filing thereof.

(4) If the court finds that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court shall issue an order authorizing the minor to act on the matter without parental consultation or consent.

(5) If the court finds that the minor is not competent to make the decision concerning the abortion on her own, but finds that the abortion nevertheless would be in the best interest of the minor, the court shall issue an order authorizing the abortion.

(6) Appeals from decisions of the court hearing the application shall be by trial de novo in the court of appeal.

(7) Each clerk of each court of appeal shall prepare appeal forms in clear and concise language which shall provide step by step instructions for filling out and filing the appeal forms. All appeal forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the appeal forms.

(8) Each appeal shall be heard in chambers, confidentially, in a summary manner, and within forty-eight hours of the filing thereof.

(9) The decision of the court of appeal shall be based on the criteria provided in Paragraphs (4) and (5) of this Subsection.

(10) Each minor who declares to the clerk of the court hearing the application or appeal that she does not have sufficient funds to pay for the costs of the application or the appeal shall be allowed to proceed in forma pauperis.

(11) Each minor who files an application or an appeal shall be entitled to a hearing and a determination by the court independently of any notice to or consultation with her parents, tutor, or guardian.

(12) Except as otherwise provided in this Section, or as otherwise provided by rule of court, hearings of applications and appeals shall be conducted in accordance with the provisions of the Louisiana Code of Juvenile Procedure.

4. Act 1254 of the 1995 Regular Session of the Louisiana Legislature.

ACT No. 1254

AN ACT

To amend and reenact R.S. 40:1299.35.5(B) and to enact R.S. 40:1299.35.5(C) and (D), relative to abortion procedures for minors; to provide for court orders authorizing a minor to make a decision concerning an abortion; to require counseling sessions; to provide relative to notification of parents; to provide relative to a determination of competence; to provide for severability and construction; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 40:1299.35.5(B) is hereby amended and reenacted and R.S. 40:1299.35.5(C) and (D) are hereby enacted to read as follows:

§ 1299.35.5. Minors

* * *

B. The following provisions shall apply to all applications for court orders by minors seeking abortions and appeals from denials of applications:

(1) Jurisdiction to hear applications shall be in the court having juvenile jurisdiction in

the parish where the abortion is to be performed or the parish in which the minor is domiciled.

(2) Each clerk of each court which has jurisdiction to hear such applications shall prepare application forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the application forms. All application forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the application forms.

(3) Each application shall be heard in chambers, anonymously, in a summary manner, and within forty-eight hours of the filing thereof.

(4) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court may issue an order authorizing the minor to act on the matter. Prior to any such order, the court may require the minor to participate in an evaluation and counseling session with a mental health professional from the Department of Health and Hospitals, office of mental health, and a staff member from the Department of Social Services, office of community services. The court may refer the petitioner, if necessary, the appropriate Department of Health and Hospitals, office of mental health regional office to arrange the evaluation and counseling session within forty-eight hours of the ex parte hearing, excluding legal holidays.

(5) If the court finds that the minor is not sufficiently mature and well enough informed to

make a decision intelligently among the alternatives, the court shall decide whether or not it would be in the best interest of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian, the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present tot [sic] advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.

(6) If the court finds that the minor is not competent to make the decision concerning the abortion or that it would not be in the minor's best interest to notify her parents or guardian, the court may issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interest of the minor.

(7) Appeals from decisions of the court hearing the application shall be by trial de novo in the court of appeal.

(8) Each clerk of each court of appeal shall prepare appeal forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the appeal forms. All appeal forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the appeal forms.

(9) Each appeal shall be heard in chambers, anonymously, in a summary manner, and within forty-eight hours of the filing thereof.

(10) The decision of the court of appeal shall be based on the criteria provided in Paragraphs (4), (5), and (6) of this Subsection.

(11) Each minor who declares to the clerk of the court hearing the application or appeal that she does not have sufficient funds to pay for the costs of the application or the appeal shall be allowed to proceed in forma pauperis.

(12) Each minor who files an application or an appeal shall be entitled to an initial hearing and a determination by the court independently of any notice to or consultation with her parents, tutor, or guardian.

(13) Except as otherwise provided in this Section, or as otherwise provided by rule of court, hearings of applications and appeals shall be conducted in accordance with the provisions of the Louisiana Children's Code.

C. Construction.

(1) Nothing in this Section shall be construed as creating or recognizing a right to abortion.

(2) It is not the intention of this Section to make lawful an abortion that is unlawful on the effective date of this Subsection or which later becomes unlawful.

D. Nothing in this Section shall be deemed or construed to affect or alter existing law on the confidentiality of proceedings and records related thereto, except to the extent specifically contained in this Section.

Section 2. Severability. The provisions of this Act are ~~declared to be severable, and if any provision, word,~~

phrase, or clause of the Act or any application thereof to any person shall be held invalid, such invalidity shall not affect the validity of the remaining portions of the Act.

Approved by the Governor, June 29, 1995.

Published in the Official Journal of the State:

August 10, 1995

5. La. R.S. 40:1299.35.5 as it existed at the commencement of this lawsuit.

§ 1299.35.5. Minors

A. No physician shall perform or induce an abortion upon any pregnant woman who is under the age of eighteen years and who is not emancipated judicially or by marriage unless the physician has received one of the following documents:

(1) A notarized statement signed by the mother, father, legal guardian, or tutor of the minor declaring that the affiant has been informed that the minor intends to seek an abortion and that the affiant consents to the abortion.

(2) A court order as provided in Subsection B of this Section.

B. The following provisions shall apply to all applications for court orders by minors seeking abortions and appeals from denials of applications:

(1) Jurisdiction to hear applications shall be in the court having juvenile jurisdiction in the parish where the abortion is to be performed or the parish in which the minor is domiciled.

(2) Each clerk of each court which has jurisdiction to hear such applications shall prepare application forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the application forms. All application forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the application forms.

(3) Each application shall be heard in chambers, anonymously, in a summary manner, and within forty-eight hours of the filing thereof.

(4) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court may issue an order authorizing the minor to act on the matter. Prior to any such order, the court may require the minor to participate in an evaluation and counseling session with a mental health professional from the Department of Health and Hospitals, office of mental health, and a staff member from the Department of Social Services, office of community services. The court may refer the petitioner, if necessary, to the appropriate Department of Health and Hospitals, office of mental health regional office to arrange the evaluation and counseling session within forty-eight hours of the ex parte hearing, excluding legal holidays.

(5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court shall decide whether or not it would be in the best

interest of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian, the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.

(6) If the court finds that the minor is not competent to make the decision concerning the abortion or that it would not be in the minor's best interest to notify her parents or guardian, the court may issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interest of the minor.

(7) Appeals from decisions of the court hearing the application shall be by trial de novo in the court of appeal.

(8) Each clerk of each court of appeal shall prepare appeal forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the appeal forms. All appeal forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the appeal forms.

(9) Each appeal shall be heard in chambers, anonymously, in a summary manner, and within forty-eight hours of the filing thereof.

(10) The decision of the court of appeal shall be based on the criteria provided in Paragraphs (4), (5), and (6) of this Subsection.

(11) Each minor who declares to the clerk of the court hearing the application or appeal that she does not have sufficient funds to pay for the costs of the application or the appeal shall be allowed to proceed in forma pauperis.

(12) Each minor who files an application or an appeal shall be entitled to an initial hearing and a determination by the court independently of any notice to or consultation with her parents, tutor, or guardian.

(13) Except as otherwise provided in this Section, or as otherwise provided by rule of court, hearings of applications and appeals shall be conducted in accordance with the provisions of the Louisiana Children's Code.

C. (1) Nothing in this Section shall be construed as creating or recognizing a right to abortion.

(2) It is not the intention of this Section to make lawful an abortion that is unlawful on August 15, 1995 or which later becomes unlawful.

D. Nothing in this Section shall be deemed or construed to affect or alter existing law on the confidentiality of proceedings and records related thereto, except to the extent specifically contained in this Section.

6. Senate Bill 1558 of the 1997 Regular Session of the Louisiana Legislature.

AN ACT

To amend and reenact R.S. 40:1299.35.5(B)(3), (4), (6), (7), and (10) and (C)(2) and to reenact R.S. 40:1299.35.5(B)(1), (2), (5), (8), (9), (11), (12) and (13), (C)(1), and (D), relative to abortion procedures for minors, to clarify procedural provisions relative to a minor's application for judicial authorization of an abortion; to provide relative to hearings, delays, determinations, the exercise of appellate supervisory power, and expedition; to clarify and provide relative to evaluation and counseling sessions and reports of the court; to provide relative to court notification of parents or guardian of immature minors; to provide relative to legislative intent; to provide for severability; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 40:1299.35.5(B)(3), (4), (6), (7), and (10) and (C)(2) are hereby amended and reenacted and R.S. 40:1299.35.5(B)(1), (2), (5), (8), (9), (11), (12) and (13), (C)(1), and (D) are hereby reenacted to read as follows:

§ 1299.35.5. Minors

* * *

B. The following provisions shall apply to all applications for court orders by minors seeking abortions and appeals from denials of applications:

(1) Jurisdiction to hear applications shall be in the court having juvenile jurisdiction in the parish where the abortion is to be performed or the parish in which the minor is domiciled.

(2) Each clerk of each court which has jurisdiction to hear such applications shall prepare application forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the application forms. All application forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the application forms.

(3)(a) Each application shall be heard in chambers, anonymously, in a summary manner, within four days, excluding legal holidays, of the filing thereof.

(b)(i) Prior to such ex parte hearing, the court may require the minor to participate in an evaluation and counseling session with a mental health professional from the Department of Health and Hospitals, office of mental health, or a staff member from the Department of Social Services, office of community services, or both. The court may refer the petitioner, if necessary, to the appropriate Department of Health and Hospitals, office of mental health regional office to arrange the evaluation and counseling session within the four-day period prior to the ex parte hearing, as provided in Paragraph (3) of Subsection B of this Section. This referral may be made by the clerk upon the minor's filing the application when the court has issued a

standing order authorizing same and the circumstances fit the criteria of the standing order therefor.

(ii) Such evaluation and counseling session shall be for the purpose of developing trustworthy and reliable expert opinion concerning the minor's sufficiency of knowledge, insight, judgment, and maturity with regard to her abortion decision in order to aid the court in its decision and to make the state's resources available to the court for this purpose. Persons conducting such sessions may employ the information and printed material referred to in R.S. 40:1299.35.6 in examining how well the minor interviewed is informed about pregnancy, fetal development, abortion risks and consequences, and abortion alternatives, and should also endeavor to verify that the minor is seeking an abortion of her own free will and is not acting under intimidation, threats, abuse, undue pressure, or extortion by any other persons.

(iii) The results of such evaluation and counseling shall be reported to the court by the most expeditious means, commensurate with security and confidentiality, to assure receipt by the court prior to or at the ex parte hearing.

(4) If the court, using reasoned judgment and evidentiary evaluation, finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court shall issue an order authorizing the minor to act on the matter without parental consultation or consent.

(5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court shall decide whether or not it would be in the best interest of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian, the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.

(6) If the court finds that the minor is not sufficiently mature and well enough informed to make the decision concerning the abortion and further finds that it would not be in the minor's best interest to notify her parents or guardian, the court shall issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interest of the minor. However, as stated in *Bellotti v. Baird*, 443 U.S. 622, 647

(1979), "the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby."

(7) In all cases, the court shall issue its final judgment and order immediately upon completion of the reconvened hearing, if there is one, or immediately upon completion of the original ex parte hearing, if there is no reconvened hearing, and in any case where unusual justification exists for taking the matter under advisement, the court shall report taking the matter under advisement to the Supreme Court of Louisiana and to the court of appeal for the circuit to which appeals lie from the court and shall issue its final judgment and order within forty-eight hours after taking the matter under advisement at the completion of such hearing. Appeals from decisions of the court hearing the application shall be by trial de novo in the court of appeal.

(8) Each clerk of each court of appeal shall prepare appeal forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the appeal forms. All appeal forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the appeal forms.

(9) Each appeal shall be heard in chambers, anonymously, in a summary manner, and within forty-eight hours of the filing thereof.

(10) The decision of the court of appeal shall be based on the criteria provided in Paragraphs (4), (5), and (6) of this Subsection, and such court shall issue its final judgment and order within forty-eight hours of its hearing.

(11) Each minor who declares to the clerk of the court hearing the application or appeal that she does not have sufficient funds to pay for the costs of the application or the appeal shall be allowed to proceed in forma pauperis.

(12) Each minor who files an application or an appeal shall be entitled to an initial hearing and a determination by the court independently of any notice to or consultation with here [sic] parents, tutor or guardian.

(13) Except as otherwise provided in this Section, or as otherwise provided by rule of court, hearings of applications and appeals shall be conducted in accordance with the provisions of the Louisiana Children's Code.

C. (1) Nothing in this Section shall be construed as creating or recognizing a right to abortion.

(2) It is not the intention of this Section to make lawful an abortion that is unlawful on the effective date of this Section or which later becomes unlawful.

D. Nothing in this Section shall be deemed or construed to affect or alter existing law on the confidentiality of proceedings and records

related thereto, except to the extent specifically contained in this Section.

Section 2. The Legislature of Louisiana hereby declares that the purpose of this Act is to remedy the issues addressed by the United States Court of Appeals, Fifth Circuit decision rendered on April 14, 1997 in *Causeway Medical Suite v. Richard P. Ieyoub*, No. 95-31178, with regard to Act No. 1254 of the 1995 Regular Session of the Legislature of Louisiana, with the exception of the issue regarding the constitutionality of R.S. 40:1299.35.5(B)(5). By retaining the language of R.S. 40:1299.35.5(B)(5) as enacted by said Act, it is the intention of the legislature in this Act to preserve the language of R.S. 40:1299.35.5(B)(5) for appeal to the United States Supreme Court of the above cited decision.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

Section 4. The provisions of this Act are declared to be severable, and if any provision, word, phrase, or clause of the Act or any application thereof to any person shall be held invalid, such invalidity shall not affect the validity of the remaining portions of the Act.

7. La. R.S. 40:1299.35.5 as it currently reads after being amended by S.B. 1558.

§ 1299.35.5. Minors

A. No physician shall perform or induce an abortion upon any pregnant woman who is under the age of eighteen years and who is not emancipated judicially or by marriage unless the physician has received one of the following documents:

(1) A notarized statement signed by the mother, father, legal guardian, or tutor of the minor declaring that the affiant has been informed that the minor intends to seek an abortion and that the affiant consents to the abortion.

(2) A court order as provided in Subsection B of this Section.

B. The following provisions shall apply to all applications for court orders by minors seeking abortions and appeals from denials of applications:

(1) Jurisdiction to hear applications shall be in the court having juvenile jurisdiction in the parish where the abortion is to be performed or the parish in which the minor is domiciled.

(2) Each clerk of each court which has jurisdiction to hear such applications shall prepare application forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the application forms. All application forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the application forms.

(3)(a) Each application shall be heard in chambers, anonymously, in a summary manner, within four days, excluding legal holidays, of the filing thereof.

(b)(i) Prior to such ex parte hearing, the court may require the minor to participate in an evaluation and counseling session with a mental health professional from the Department of Health and Hospitals, office of mental health, or a staff member from the Department of Social Services, office of community services, or both. The court may refer the petitioner, if necessary, to the appropriate Department of Health and Hospitals, office of mental health regional office to arrange the evaluation and counseling session within the four-day period prior to the ex parte hearing, as provided in Paragraph (3) of Subsection B of this Section. This referral may be made by the clerk upon the minor's filing the application when the court has issued a standing order authorizing same and the circumstances fit the criteria of the standing order therefor.

(ii) Such evaluation and counseling session shall be for the purpose of developing trustworthy and reliable expert opinion concerning the minor's sufficiency of knowledge, insight, judgment, and maturity with regard to her abortion decision in order to aid the court in its decision and to make the state's resources available to the court for this purpose. Persons conducting

such sessions may employ the information and printed material referred to in R.S. 40:1299.35.6 in examining how well the minor interviewed is informed about pregnancy, fetal development, abortion risks and consequences, and abortion alternatives, and should also endeavor to verify that the minor is seeking an abortion of her own free will and is not acting under intimidation, threats, abuse, undue pressure, or extortion by any other persons.

(iii) The results of such evaluation and counseling shall be reported to the court by the most expeditious means, commensurate with security and confidentiality, to assure receipt by the court prior to or at the ex parte hearing.

(4) If the court, using reasoned judgment and evidentiary evaluation, finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court shall issue an order authorizing the minor to act on the matter without parental consultation or consent.

(5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court shall decide whether or not it would be in the best interest of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian,

the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.

(6) If the court finds that the minor is not sufficiently mature and well enough informed to make the decision concerning the abortion and further finds that it would not be in the minor's best interest to notify her parents or guardian, the court shall issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interest of the minor. However, as stated in *Bellotti v. Baird*, 443 U.S. 622, 647 (1979), A the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby.

(7) In all cases, the court shall issue its final judgment and order immediately upon completion of the reconvened hearing, if there is one, or immediately upon completion of the original ex parte hearing, if there is no reconvened hearing, and in any case where unusual justification exists for taking the matter under advisement, the court shall report taking the matter under advisement to the Supreme Court of Louisiana and to the court of appeal for the circuit to which appeals lie from the court and shall issue its final judgment and order within forty-eight hours after taking the matter under advisement at the completion of such hearing. Appeals from decisions of the court hearing the

application shall be by trial de novo in the court of appeal.

(8) Each clerk of each court of appeal shall prepare appeal forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the appeal forms. All appeal forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the appeal forms.

(9) Each appeal shall be heard in chambers, anonymously, in a summary manner, and within forty-eight hours of the filing thereof.

(10) The decision of the court of appeal shall be based on the criteria provided in Paragraphs (4), (5), and (6) of this Subsection, and such court shall issue its final judgment and order within forty-eight hours of its hearing.

(11) Each minor who declares to the clerk of the court hearing the application or appeal that she does not have sufficient funds to pay for the costs of the application or the appeal shall be allowed to proceed in forma pauperis.

(12) Each minor who files an application or an appeal shall be entitled to an initial hearing and a determination by the court independently of any notice to or consultation with here [sic] parents, tutor or guardian.

(13) Except as otherwise provided in this Section, or as otherwise provided by rule of court, hearings of applications and appeals shall be conducted in accordance with the provisions of the Louisiana Children's Code.

C.(1) Nothing in this Section shall be construed as creating or recognizing a right to abortion.

(2) It is not the intention of this Section to make lawful an abortion that is unlawful on the effective date of this Section or which later becomes unlawful.

D. Nothing in this Section shall be deemed or construed to affect or alter existing law on the confidentiality of proceedings and records related thereto, except to the extent specifically contained in this Section.

APPENDIX F

FEDERAL PROVISIONS

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the

United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

No. 97-92 (2)

Supreme Court, U.S.
FILED
SEP 10 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD P. IEYOUB, in his official capacity as Attorney General of the State of Louisiana; M. J. "MIKE" FOSTER, JR., in his official capacity as Governor of the State of Louisiana; ROBBY P. JINDAL, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals; and MADLYN B. BAGNERIS, in her official capacity as Secretary of the Louisiana Department of Social Services,

Petitioners,

—v.—

CAUSEWAY MEDICAL SUITE and HOPE MEDICAL GROUP FOR WOMEN, on behalf of themselves and the patients they serve,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED

Whether the 1995 amendments to Louisiana's parental consent abortion law violate the right to privacy of all minors (including mature minors) by requiring a bypass court to notify and consult with both parents of an immature minor if the court finds parental notification to be in her best interest?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. QUESTION ONE OF THE PETITION ESTABLISHES NONE OF THE FACTORS WEIGHING IN FAVOR OF A GRANT OF CERTIORARI. 6

II. QUESTIONS TWO, THREE AND FOUR OF THE PETITION PROVIDE NO BASIS FOR THIS COURT'S REVIEW. 17

A. The Shall/May Issue Decided by the Courts Below has Become Moot. 17

B. Jurisdiction of the Lower Courts Over this Case is Well Established Under Existing Law 19

C. Question Four of the Petition was Not Decided by the Courts Below 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page**

A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995), *appeal stayed*, No. 95-3965 (7th Cir. Jan 22, 1996) 20

Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) 8, 9

Barnes v. Moore, 970 F.2d 12 (5th Cir.), *cert. denied*, 506 U.S. 1021 (1992) 20

Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974) 18

Bellotti v. Baird, 443 U.S. 622 (1979) ..... *passim*

Casey v. Planned Parenthood, 14 F.3d 848 (3d Cir. 1994) 20

Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) 1

Causeway Medical Suite v. Ieyoub, 905 F. Supp. 360 (E.D. La. 1995) 1

Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 404 U.S. 412 (1972) 6, 18

Ex parte Young, 209 U.S. 123 (1908) 19

Fusari v. Steinberg, 419 U.S. 379 (1975) 6

Glick v. McKay, 937 F.2d 434 (9th Cir. 1991) 15

H.L. v. Matheson, 450 U.S. 398 (1981) 15, 16

Hall v. Beals, 396 U.S. 45 (1969) 6

Hodgson v. Minnesota, 497 U.S. 417 (1990) ..... *passim*

Indiana Planned Parenthood v. Pearson,
716 F.2d 1127 (7th Cir. 1983) 16

Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996),
cert. denied, 117 S. Ct. 2453 (1997) 20

Janklow v. Planned Parenthood,
116 S. Ct. 1582 (1996) 20

Lambert v. Wicklund, 117 S. Ct. 1169 (1997) 7, 12, 16

Maher v. Roe, 432 U.S. 464 (1977) 18

Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984),
aff'd on other grounds sub nom. Margaret S.
v. Edwards, 794 F.2d 994 (5th Cir. 1986) 2

Ohio v. Akron Ctr. for Reprod. Health,
497 U.S. 502 (1990) 5, 14, 15

Opdenwyer v. Brown, 99 So. 482 (La. 1924) 10

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 8, 15, 20

Planned Parenthood v. Miller, 63 F.3d 1452
(8th Cir. 1995), *cert. denied*,
116 S. Ct. 1582 (1996) 15, 20

Spector Motor Service, Inc. v. McLaughlin,
323 U.S. 101 (1944) 17

State v. Muller, 365 So. 2d 464 (La. 1978) 10

State of Nevada v. Watkins, 943 F.2d 1080
(9th Cir. 1991) 18

Tully v. Mobile Oil Corp., 455 U.S. 245 (1982) 6

United States v. Alabama, 362 U.S. 602 (1960) 6

United States v. Salerno, 481 U.S. 739 (1987) 20

United States Dep't of Justice v. Provenzano,
469 U.S. 14 (1984) 17

Whalen v. Roe, 429 U.S. 589 (1977) 8

Women's Community Health Ctr., Inc. v. Cohen,
477 F. Supp. 542 (D. Me. 1979) 16

Women's Medical Prof'l Corp. v. Voinovich,
911 F. Supp. 1051 (S.D. Ohio 1995),
appeal docketed, Nos. 96-3157 & 96-3159
(6th Cir. Feb. 8, 1996) 20

Zablocki v. Redhail, 434 U.S. 374 (1978) 18

Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985),
aff'd by an equally divided Court,
484 U.S. 171 (1987) 16

Constitutional Provisions, Statutes & Rules

La. Const. Art 4, § 5(A) 19

La. Const. Art 4, § 8 19

La. Rev. Stat. § 40:1299.35.5 (West Supp. 1996)..... 1, 19

La. Rev. Stat. § 40:1299.35.5(A) (West Supp. 1996) 2

La. Rev. Stat. § 40:1299.35.5(A)(1)
(West Supp. 1996)..... 10, 11

La. Rev. Stat. § 40:1299.35.5 (B)(4) (West Supp. 1996).... 2

La. Rev. Stat. § 40:1299.35.5(B)(5)
(West Supp. 1996)..... *passim*

1995 La. Acts 1254 ..... 3, 5

Sup. Ct. R. 10(a)..... 6, 16

Sup. Ct. R. 10(c) 6, 16, 20

Miscellaneous

ROBERT L. STERN ET AL., SUPREME COURT
PRACTICE 710 (7th ed. 1993)..... 17

75 Op. Atty. Gen. Md. 14, 1990 Md. AG
LEXIS 46 (Aug. 30, 1990)..... 16

Respondents Causeway Medical Suite and Hope Medical Group for Women, on behalf of themselves and the patients they serve, respectfully submit the following brief in opposition to the petition for certiorari filed by Richard F. Ieyoub, the Attorney General of Louisiana, *et al.*, docketed on July 17, 1997.

OPINIONS BELOW

The opinion of the district court is reported at 905 F. Supp. 360 (E.D. La. 1995). The opinion of the court of appeals is reported at 109 F.3d 1096 (5th Cir. 1997).

COUNTERSTATEMENT OF THE CASE

This suit challenges the constitutionality of certain amendments to Louisiana's statutory requirement that a minor seeking an abortion obtain the prior consent of her parent or guardian. La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1996) ("Louisiana's parental consent law"). The decision of the district court concisely sets forth the following legislative background of that law:

> LSA-R.S. 40:1299.35.5 is a Louisiana statute that regulates the circumstances under which a woman under the age of 18 can obtain an abortion in the State of Louisiana. Under LSA-R.S. 40:1299.35.5, a physician is prohibited from performing an abortion on a minor without either the consent of one parent or guardian, or an order from a juvenile court judge allowing the abortion. The process for obtaining a court order in lieu of parental consent is called a judicial bypass.
>
> The instant dispute centers on the 1995 amendments to the judicial bypass provision. Prior to the 1995 amendments, the judicial bypass provision stated:
>
> (4) If the court finds that the minor is sufficiently mature and well enough informed to make a decision

concerning the abortion on her own, the court *shall* issue an order authorizing the minor to act on the matter without parental consultation or consent.

(5) If the court finds that the minor is not competent to make a decision concerning the abortion on her own, but finds that the abortion nevertheless would be in the best interest of the minor, the court *shall* issue an order authorizing the abortion.

LSA-R.S. 40:1299.35.5 (A) and (B)(4)-(5) (1994) (emphasis added).

The judicial bypass provision of [Louisiana's parental consent law] had been in effect as written above for more than ten years. The prior version of the Louisiana parental consent law was upheld by this Court in the case of *Margaret S. v. Treen*, 597 F. Supp. 636, 650-52 (E.D. La. 1984), *aff'd on other grounds sub nom. Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986).

The 1995 amendments to the Louisiana parental consent law change the judicial bypass provision so that it reads as follows:

(4) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court *may* issue an order authorizing the minor to act on the matter. Prior to any such order, the court may require the minor to participate in an evaluation and counseling session with a mental health professional

. . .

(5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court *shall* decide whether or not it would be in the best interest

> of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian, the court *shall* so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.
>
> (6) If the court finds that the minor is not competent to make the decision concerning the abortion or that it would not be in the minor's best interest to notify her parents or guardian, the court *may* issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interests of the minor.

80a-82a (emphasis in original).[1]

On July 6, 1995, respondents filed this constitutional challenge to the 1995 Amendments to Louisiana's parental consent law, Act 1254 (1995 Amendments). The district court granted summary judgment in respondents' favor, permanently enjoining enforcement of the 1995 Amendments. The district court held that, as amended, Louisiana's parental consent law did not meet the requirements of *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality) (*Bellotti II*), and therefore imposed an undue burden on the right of minors to have access to abortion services. 92a.[2]

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[1] Citations to the petition are in the form "Pet. __"; citations to its appendix are in the form "___a".

[2] Specifically, the district court held that the 1995 Amendments: (1) impermissibly granted discretion to state court judges to ignore the maturity and/or best interest of a minor and deny her bypass application, 87a-89a; (2) impermissibly failed to provide sufficient expedition because the bypass procedure had no time limit on when the juvenile court must decide the application and when a referral for evaluation and counseling

The Court of Appeals for the Fifth Circuit affirmed the district court's ruling, holding that the 1995 Amendments presented three constitutional infirmities: (1) the changes from "shall" to "may" impermissibly delegated to juvenile court judges the authority to decide whether to order an abortion for a mature, well-informed minor or for a minor for whom an abortion is in her best interest, 21a-30a; (2) the removal of a specific time for deciding upon a minor's application and for the completion of counseling and evaluation left the consent statute inadequate to meet *Bellotti II*'s expediency requirements, 30a-34a; and (3) the parental notification provision contained in La. Rev. Stat. Ann. § 40:1299.35.5(B)(5) ("parental notification provision") improperly permitted juvenile court judges to notify the parent or guardian of an "immature" minor of the proceedings before it and to consult with those adults as part of the judge's process of deciding upon the minor's application, 34a-37a.

With respect to the parental notification provision, the court of appeals held:

> If *Bellotti II* means anything, it surely means that States seeking to regulate minors' access to abortion must offer a credible bypass procedure, independent of parents or legal guardians, in a parental consent statute like the one in Louisiana. Plainly, the State has attempted to enter through the proverbial back door by suggesting that the "best-interest-of-the-minor" inquiry cannot arbitrarily exclude the input of parents or a legal guardian. Although the Supreme Court has recognized that bypass decisonmakers can consider whether parental notification would be in the

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must be completed, 89a-91a; and (3) violated the minor's right to make an abortion decision anonymously and confidentially by authorizing the state court to notify the girl's parents that she sought a judicial bypass, 91a-92a.

> best interest of the minor, *Bellotti II*, 443 U.S. at 640, 99 S. Ct. at 3046-47, and that complete anonymity is not required, [*Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990) (*Akron II*)], the Court has *not* held that anonymity may give way to parental notification in bypass statutes.

36a.

In response to the court of appeals' decision, the Louisiana Legislature enacted further amendments to the parental consent law in 1997. 107a-113a ("1997 Amendments"). The 1997 Amendments changed the "may" language back to "shall," curing the impermissible delegation of discretion to bypass judges. 110a. The 1997 Amendments also remedied the expediency problems of the 1995 Amendments by setting forth specific time periods within which the court must rule on a minor's application and within which counseling and evaluation reports must be filed with the court. 108a-111a. With respect to the parental notification provision, however, the legislature made no change from the language of the 1995 Amendments, explicitly noting its "intention . . . to preserve the language of R.S. 40:1299.35.5 (B)(5) for appeal to the United States Supreme Court of [*Causeway Medical Suite v. Ieyoub*]." 113a.

Subsequent to the passage of the 1997 Amendments, the parties entered into a stipulation, filed with the court of appeals, that "the Court may enter an order enjoining enforcement of the Parental Notification Provision, as amended by the 1997 Amendments, (La. R.S. 40:1299.35.5(B)(5)), until such time, if ever, as the permanent injunction entered in this case against enforcement of the Parental Notification Provision, as amended by Act 1254, is reversed or vacated." The stipulation expressed the parties' understanding that any further judicial review in this case would involve

consideration of Louisiana's parental consent law as amended by the 1997 Amendments. *See Tully v. Mobile Oil Corp.*, 455 U.S. 245, 247 (1982) ("The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision."). *See also Fusari v. Steinberg*, 419 U.S. 379, 387 (1975) (Supreme Court must review lower court decision in light of existing law, not the law in effect at time judgment was rendered); *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (same); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (same); *United States v. Alabama*, 362 U.S. 602, 604 (1960) (same).

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied because the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. First, the decision of the court below is not "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a); nor did the court below decide "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Further, no important question of federal law is raised by this case that has not been, but should be settled by the Court. *Id.* Accordingly, the petition should be denied.

I. QUESTION ONE OF THE PETITION ESTABLISHES NONE OF THE FACTORS WEIGHING IN FAVOR OF A GRANT OF CERTIORARI.

The lower court's ruling on the merits of this case fully accords with the controlling parental involvement decisions of this Court and the courts of appeals. Accordingly, question one of the petition does not provide a basis for this Court's grant of certiorari.

This Court has repeatedly held that while states may attempt to require young women to obtain the consent of

their parents in a decision to terminate a pregnancy, parental consent cannot be mandated in every circumstance. Rather, abortion laws mandating parental consent must contain an alternative method by which the young woman can seek authorization for the abortion without parental involvement. *Bellotti II*, 443 U.S. at 643. *See also Lambert v. Wicklund*, 117 S. Ct. 1169, 1171 (1997). This alternative bypass procedure is necessary to ensure the privacy rights of all young women, including young women who cannot seek parental consent for abortion. *See Bellotti II*, 443 U.S. at 642-43. Such young women include those in abusive families, who are entitled to avoid parental involvement completely. *See Hodgson v. Minnesota*, 497 U.S. 417, 460 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) (condemning Minnesota abuse exception as "in reality, a means of notifying the parents"). Without such a bypass, a parental consent law would delegate unconstitutional "veto power" over a young woman's abortion decision to her parent or guardian. *See Bellotti II*, 443 U.S. at 644.

The alternative bypass procedure in a constitutional parental consent law must meet four criteria, established in *Bellotti II* and applied consistently in all this Court's subsequent cases. The procedure must:

> (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well informed enough to make the abortion decision independently; (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (iii) ensure the minor's anonymity; and (iv) provide for expeditious bypass procedures.

Lambert, 117 S. Ct. at 1171 (setting forth principles established in *Bellotti II*). *See also Planned Parenthood v.*

Casey, 505 U.S. 833, 899 (1992); *Akron II*, 497 U.S. at 511-514.

The anonymity required of the bypass procedure is designed to protect both the young woman's interest in avoiding parental involvement and her broader interest in avoiding disclosure of intensely private information to the public. *See Akron II*, 497 U.S. at 513 (bypass must "take[] reasonable steps to prevent the public from learning of the minor's identity"); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (right of privacy includes "the individual interest in avoiding disclosure of personal matters").

In particular, *Bellotti II* explicitly requires that if a court finds that the minor is mature or that the abortion is in her best interests, the court must authorize the abortion without requiring *any* parental involvement. *Bellotti II*, 443 U.S. at 647-48 (if the minor is mature, "the court must authorize her to act without parental consultation or consent"; and if the abortion is in the immature minor's best interests, "she is entitled to court authorization without any parental involvement"). Indeed, one of the chief reasons this Court invalidated the Massachusetts parental consent law in *Bellotti II* was because the Massachusetts Supreme Judicial Court had construed the statute as requiring parental involvement. *Bellotti II*, 443 U.S. at 646-47 ("an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion") (footnote omitted). Furthermore, the bypass mechanism in any parental involvement statute must not itself give notice to the minor's parents. *Hodgson*, 497 U.S. at 460 (O'Connor, J., concurring) (Minnesota's statutory "bypass" for abused and neglected minors inadequate because it could result in notice to parents); *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 441 n.31 (1983) (*Akron I*).

In contravention of both *Hodgson* and *Bellotti II*, Louisiana's parental consent law permits a juvenile court

judge to breach a young woman's confidentiality by notifying both her parents, against her will, that she is pregnant and seeking an abortion. La. Rev. Stat. Ann. § 40:1299.35.5(B)(5) ("If the court finds that it is in the minor's best interest to notify her parents or guardian, the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.").[3] This statute conflicts with the anonymity requirement of this Court's prior decisions in at least four significant ways.

First, it denies all minors, including mature minors, access to a judicial bypass proceeding that ensures confidentiality vis-a-vis the minor's parents or guardian. *Bellotti II*, 443 U.S. at 647-48. Because a minor cannot be certain prior to the bypass proceeding that the court will find that she is mature and that notification is not in her best interest, every minor risks the possibility that the court will initiate parental notification with respect to her bypass application. Unlike any other parental involvement requirement previously addressed by this Court, Louisiana's statute directs a bypass judge who has found parental notification to be in an immature minor's best interest not to deny the minor's application, but to undertake the notification of both the minor's parents,[4] regardless of her

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[3] Because this provision *requires* the judge to breach the minor's confidentiality in direct contravention of the *Bellotti II* standards, the Court cannot presume that the 1997 Amendments will be applied constitutionally. *See Akron I*, 462 U.S. at 441 (finding that Akron parental consent ordinance was not "reasonably susceptible of being construed to [comport with *Bellotti II*]").

[4] There can be no doubt that the statute requires notification by the state court of both parents, for it uses the plural term "parents" in prescribing notification, while using the singular "mother or father" in its alternative of parental consent. *Compare* La. Rev. Stat. § 40:1299.35.5 (B)(5) *with* La. Rev. Stat. § 40:1299.35.5 (A)(1). Under Louisiana law, the use of

wishes.[5] La. Rev. Stat. § 40:1299.35.5(B)(5). The statute contains no exception to this requirement for minors who live with one custodial parent. *Id.* The judge must carry out this notification prior to determining whether an abortion is in the minor's best interest and prior to any appeal. *Id.* Thus, even a minor later held to be mature by a Louisiana court of appeals faces compelled two-parent notification based on an erroneous trial court finding that she is immature. This risk of parental notification by the court will undoubtedly deter some minors, both mature and immature, from seeking an abortion.[6] As Justice O'Connor explicitly recognized in her controlling opinion in *Hodgson v. Minnesota*, 497 U.S. at 460, a proposed bypass mechanism "is less than effectual" when that mechanism itself provides notice to the minor's parents. (O'Connor, J., concurring) (striking down a two-parent notification requirement and holding inadequate that statute's "abuse exception" which would have resulted in notice to the minor's parents).

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two different words in the same statute demonstrates the legislature's intent to assign different meanings. *Opdenwyer v. Brown*, 99 So. 482, 484 (La. 1924) ("[W]e cannot assume that when [the authors of our Code] said two different things, nevertheless they meant only one and the same"). *Cf. State v. Muller*, 365 So. 2d 464, 466 (La. 1978) (where new statute is worded differently from preceding statute, legislature is presumed to have intended to change the law). The statute also dictates that the court *shall* notify the minor's parents. The legislature's 1995 and 1997 changes from "shall" to "may," and then back to "shall" in response to this lawsuit, indicate the legislature's understanding that the term shall precludes any trial court discretion not to notify the minor's parents or to only notify one of those parents.

[5] A minor may, for example, wish at that point to involve only her custodial parent in the bypass proceedings, or to carry the pregnancy to term without informing either or both of her parents, or to travel to a jurisdiction that does not require parental involvement.

[6] Petitioners' assertion that the parental notice provision only affects *immature* minors, *see e.g.*, Pet. 8, 10, simply ignores the deterrent effect that the *risk* of notification would have on young women who are ultimately found to be mature.

Second, not only does Louisiana's parental notice provision run afoul of *Bellotti II's* anonymity requirement and Justice O'Connor's opinion in *Hodgson,* it is not justified by any legitimate state interest. As the *Hodgson* Court recognized, the state has no interest in forcing the minor and *both* her parents -- one of whom may well be an estranged, non-custodial parent or an abuser of the child or the other parent -- to communicate with one another about the abortion decision. *Hodgson*, 497 U.S. at 450-51 (opinion of the Court). The *Hodgson* Court found that in "the ideal family setting," the state "has no legitimate interest" in requiring notice to both parents because it may not "question[] one parent's judgment that notice to the other parent would not assist the minor or . . . presume[] that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child." *Id.* at 450. With respect to dysfunctional families, the Court held that the two-parent notification requirement not only failed to serve any state interest, it actually "disserve[d] the state interest in protecting and assisting the minor." *Id. See also id.* at 459 (O'Connor, J., concurring) (agreeing with Court's opinion "that Minnesota has offered no sufficient justification for its interference with the family's decisionmaking processes"); *id.* at 460 ("Given its broad sweep and its failure to serve the purposes asserted by the state in too many cases, I join the Court's striking of [Minnesota's two-parent notification requirement without a bypass"). Yet Louisiana's parental consent requirement requires that the court notify *both* parents, despite the fact that only one of them must consent to the minor's abortion, and regardless of the minor's family circumstances. La. Rev. Stat. §§ 40:1299.35 (A)(1), (B)(5). Such two-parent notification "substitut[es the state's] conception of family life for the family's own view," and is unconstitutional. *Hodgson*, 497 U.S. at 452.

Third, Louisiana's parental consent law violates the right of privacy of immature minors by permitting a minor's

parents or guardian to participate in the bypass decisionmaker's determination of whether an abortion is in the minor's best interest. Under *Bellotti II*, an immature minor is entitled to an *independent* determination by the bypass decisionmaker of whether an abortion is in her best interest. *Bellotti II*, 443 U.S. at 647-48. If the bypass decisionmaker finds that the abortion is in the minor's best interest, the minor must be permitted to obtain the abortion without any parental involvement. *Id.* Moreover, the state has no legitimate interest in requiring *both* of the minor's parents to participate together in the decision of whether the minor's best interests would be served by seeking an abortion. *Hodgson*, 497 U.S. at 450-51. Indeed, such a requirement violates a single parent's right to avoid contact and communication with a non-custodial spouse. *Hodgson*, 497 U.S. at 451.

Finally, Louisiana's parental consent law further violates the right of privacy of immature minors with respect to whom the court would have made a best interest finding prior to parental involvement, but does not so find after parental consultation. Under Louisiana's parental consent law, a bypass court must ask whether parental notification is in an immature minor's best interest *before* determining whether an abortion is in the minor's best interest. A parental involvement statute, however, cannot pass constitutional muster if it places the "notification-in-best-interest" question ahead of and apart from the "abortion-in-best-interest" question. *See Bellotti II*, 443 U.S. at 648 (if court determines that abortion is in best interest of immature minor, "she is entitled to court authorization without any parental involvement"). *Cf. Lambert*, 117 S. Ct. at 1172 (parental notice statute upheld where it did not "permit[] a court to separate the question whether parental notification is not in a minor's best interest from an inquiry into whether abortion

(without notification) is in the minor's best interest").[7] Accordingly, the court of appeals correctly held that the bypass procedure in Louisiana's parental consent law fails to comply with the standards set forth in this Court's prior parental involvement decisions.

In an effort to avoid *Bellotti II*'s clear requirement of anonymity, the petitioners incorrectly claim that *Bellotti II* authorizes a bypass court to notify the parent or guardian of an immature minor who has applied for a judicial bypass. *See* Pet. 8, 11, 21.[8] Petitioners' faulty conclusion is based upon a misreading of the following portion of *Bellotti II*:

> [T]he court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required.

Bellotti II, 443 U.S. at 648 (footnote omitted). As the court of appeals correctly found, 35a-36a, however, this language stands for the proposition that a court *need not immediately deny* the bypass application of an immature minor as to

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[7] Petitioners incorrectly contend that Louisiana's parental consent law requires notification only with respect to "*immature* minors for whom it is not apparent that the abortion would be in her best interest." Pet. 17 (emphasis in original). Under the plain language of that statute, however, if notice is in an immature minor's best interest, the bypass court cannot reach the "abortion-in-best-interest" question until after notifying the young woman's parents. La. Rev. Stat. 40:1299.35.5 (B)(5).

[8] Petitioners also assert that "[t]his Court's pronouncements on anonymity do not create a constitutional right for immature minors to avoid the guidance of their parents." Pet. 18. In fact, however, *Bellotti II* makes clear that, at a minimum, an immature young woman has a right to obtain an abortion without any parental involvement if an abortion is in her best interest. *Bellotti II*, 443 U.S. at 647-48.

whom the court believes an abortion would, under the relevant circumstances, not be in the minor's best interest. *See Bellotti II*, 443 U.S. at 648. Instead of denying the application in those circumstances, the court may defer resolution of the application until the minor, *by her own choice and of her own accord,* notifies her parents of her pregnancy and involves them in the authorization process. *Id.* Thus, the quoted language addresses parental consultation that takes place *after* the court's maturity and best interest findings are made and *only if* authorization for an abortion is not warranted by those findings. As the court of appeals held:

> [T]his language from *Bellotti II* in no way permits the independent bypass decisionmaker to contact a minor's parents, inform them that their minor daughter is seeking an abortion without their consent, and then ask the parents to participate in the process of deciding whether the abortion would be in the minor's best interest.

35a. Petitioners' interpretation of the quoted language would completely eviscerate the rule of anonymity established in *Bellotti II*.[9]

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[9] In a futile attempt to argue that Louisiana's parental consent law somehow meets *Bellotti II*'s anonymity requirement, Pet. 20-22, petitioners also misread the statement in *Bellotti II*, 443 U.S. at 648, that "the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court." Although the Court clearly used the term "initial" to refer to the minor's access to the a bypass proceeding *prior to resort to her parents*, *see id* at 647-48, petitioners erroneously rely upon this language to argue that *Bellotti II*'s anonymity requirement is limited only to the minor's *first step* in pursuing judicial authorization for an abortion, *see* Pet. 21. Petitioner's interpretation finds no support in *Bellotti II* and ignores the fact that if a minor's anonymity is threatened at *any* stage of the bypass procedure, her willingness and freedom to gain *initial access* to that procedure will be hindered. Second, by misconstruing the term "public" in *Akron II*, 497 U.S. at 513, petitioners erroneously rely on that case for the proposition

Equally unpersuasive is petitioners' attempt to sidestep the constitutional infirmities of Louisiana's parental consent law by claiming that this case involves parental notice rather than consent, and that parental notice laws need not contain a *Bellotti II* -type bypass. *See, e.g.*, Pet. 12-13 (citing *H.L. v. Matheson*, 450 U.S. 398 (1981)), 16, 18 (citing *Hodgson*, 497 U.S. 417). Unlike *Hodgson* and *Matheson*, this case addresses a parental *consent* law, not simply a requirement of parental notice. As such, it must meet the requirements of *Bellotti II*. *See Bellotti II*, 443 U.S. at 648 (discussing the "full extent" of parental involvement permitted in connection with consent statutes).[10] Petitioners' implication that a

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that anonymity need be maintained only as to the public, and, thus, not as to a minor's parents. Pet. 22. As the Court's discussion in *Akron II* makes clear, the Court utilized that word not to distinguish between persons known and unknown to the minor, but between persons responsible for the internal administration of the courts and all other persons, including the minor's parents.

[10] Even if Louisiana's parental consent law were construed as a notification requirement, it would not survive constitutional scrutiny. Although this Court has left open the question of whether a parental notification law requires a *Bellotti II* -type bypass, *Akron II*, 497 U.S. at 510, Justice O'Connor's controlling opinion in *Hodgson* recognized that a proposed "bypass mechanism" that might itself cause parental notice is impermissible even in the parental notification context. *Hodgson*, 497 U.S. at 460 (O'Connor, J., concurring) (rejecting suggestion that abuse and neglect exception provided adequate protection for minors who did not want to notify their parents). *See also Planned Parenthood v. Miller*, 63 F.3d 1452, 1460-63 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996) (rejecting contention that abuse and neglect exception could provide adequate protection for minors seeking to avoid parental notification). This Court has also properly recognized, with respect to married women, that husband notification and husband consent are essentially equivalent. *Casey*, 505 U.S. at 897. Moreover, the federal courts have repeatedly invalidated parental notification requirements that do not contain an anonymous, expeditious bypass procedure permitting a mature minor or a minor for whom an abortion is in her best interest to obtain an abortion without any parental involvement. *Miller*, 63 F.3d at 1460 ("parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass"); *Glick v. McKay*, 937

consent requirement need not meet the *Bellotti II* requirements if it *also* contains a notification requirement is absurd.

Because the decision of the court below correctly applies the controlling standards set forth in *Bellotti II* and its progeny, it neither creates a conflict with the decisions of this Court or the courts of appeals nor presents an important question of federal law that has not been, but should be, addressed by this Court. Sup. Ct. R. 10 (a), (c).[11] Accordingly, the petition should be denied.

F.2d 434 (9th Cir. 1991) (applying the same standards applicable to a judicial bypass for a parental consent statute to strike down a Nevada parental notice law); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983) (construing Supreme Court precedent to require "that states provide bypass procedures in connection with both consent and notification statutes"). *See also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985) (the *Bellotti II* standard "also governs provisions requiring parental notification"), *aff'd by an equally divided Court*, 484 U.S. 171 (1987); *Women's Community Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 546-48 (D. Me. 1979) (issuing preliminary injunction against enforcement of Maine parental notification statute because "it fails to meet the constitutional standard defined in Mr. Justice Powell's opinion" in *Bellotti II*); 75 Op. Atty. Gen. Md. 14, 1990 Md. AG LEXIS 46, at *22 (Aug. 30, 1990) (concluding, in wake of *Akron II*, that "Until the Supreme Court clearly enunciates a new rule of law, we must continue to rely on existing precedent indicating that any parental notice requirement must include a bypass procedure meeting the standards of *Bellotti v. Baird*."). *See also Lambert*, 117 S. Ct. at 1172 (upholding parental notification requirement on the grounds that properly construed, its bypass met the guidelines of *Bellotti II*). *Cf. Matheson*, 450 U.S. at 407 (ruling that requirement of parental notice "if possible" did not violate rights of an immature minor who "made no claim or showing as to her maturity or as to her relations with her parents").

[11] Petitioners contend that "the only issue to which this Court's prior decisions do not speak is whether the notification of an immature minor's parents can be effected by the judge who must determine whether the abortion is in the immature minor's best interest rather than by a physician as in traditional parental notification statutes." Pet. 10. As explained, *supra* at 8-11, that question is disposed of by *Bellotti II* and

II. QUESTIONS TWO, THREE AND FOUR OF THE PETITION PROVIDE NO BASIS FOR THIS COURT'S REVIEW.

A. The Shall/May Issue Decided by the Courts Below has Become Moot.

Question two of the petition seeks review of the shall/may issue decided by the courts below. Because the 1995 Amendments provided that judges "may," rather than "shall," grant bypass applications that satisfy the criteria established in *Bellotti II*, the lower courts correctly determined that such a grant of discretion violated the constitutional requirements articulated in *Bellotti II*. 20a-30a; 87a-89a. Subsequent to the court of appeals' ruling in the case, however, the Louisiana Legislature passed the 1997 Amendments which replaced the discretionary term "may" with the mandatory "shall," rendering moot the shall/may question raised below. Because that issue is moot, it does not present a question appropriate for this Court's certiorari review. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 710 (7th ed. 1993) ("If the controversy becomes academic by reason of changed circumstances, the Court's jurisdiction ceases and the case becomes moot."); *United States Dep't of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (law passed during the pendency of the litigation mooted the question of statutory interpretation as to which certiorari was granted because no matter how the Court decided the issue,

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Hodgson. But, even if that question had not yet been answered, this case would not provide the Court with an appropriate opportunity to address it because Louisiana's parental consent law presents a number of other infirmities which clearly require its invalidation under existing law. Thus, petitioners' question would improperly seek a constitutional determination unnecessary to resolution of the case. *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

its decision would not have affected the rights of the parties); *Diffenderfer*, 404 U.S. at 414 (appeal was moot where a law passed during the pendency of the litigation repealed the statute at issue and replaced it with scheme that at least limited, if not eradicated, the statutory application challenged); *State of Nevada v. Watkins*, 943 F.2d 1080 (9th Cir. 1991) (legislative action rendered state's petition moot).[12]

Although they concede that "the 'may' and 'shall' *language* issue is now moot with the enactment of Senate Bill 1558 of 1997," Pet. 23 (emphasis in original), petitioners still seek a ruling from this Court on whether the kind of discretion granted by the 1995 Amendments *would have been* constitutional. *Id.* The petitioners' desire for an advisory opinion, however, provides no basis for granting certiorari. *Diffenderfer*, 404 U.S. at 414 (where statute passed during pendency of suit repealed statute at issue, the case had "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law").

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[12] Thus, this is not a case like *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977), where the state's revision of a challenged law "was made only for the purpose of interim compliance" with a lower court order. *See also Zablocki v. Redhail*, 434 U.S. 374, 382 n.9 (1978) (no mootness where change in law was contingent upon courts' ruling on prior laws); *Beare v. Briscoe*, 498 F.2d 244, 245 n.5 (5th Cir. 1974) (same). In this case, the Louisiana Legislature has unconditionally acted to remedy the shall/may and expediency issues rather than seek further appellate review of those matters. 113a (" [T]he purpose of this Act is to remedy the issues addressed by [the Fifth Circuit's decision in this case] . . . with the exception of the [parental notice provision] issue . . . . [I]t is the intention of the legislature in this Act to preserve the [parental notice provision issue] for appeal to the United States Supreme Court . . . ").

B. Jurisdiction of the Lower Courts Over this Case is Well Established Under Existing Law.

Petitioners' argument in question three that this Court and the courts below lack Article III jurisdiction over this controversy also lacks merit. Whether petitioners have authority to control Louisiana state court procedures is irrelevant to the issue before the Court. Respondents do not seek an injunction against family court operations. Rather, they seek an injunction against enforcement of La. Rev. Stat. Ann. § 40:1299.35.5, the Louisiana statute that criminalizes the provision of abortion services to young women in certain circumstances. Clearly, the Governor and the Attorney General of the State of Louisiana have authority to enforce Louisiana's criminal laws and can therefore be enjoined from doing so. *See* La. Const. Art 4, § 8 (Attorney General is responsible for enforcing Louisiana laws); La. Const. Art 4, § 5(A) (Governor has legal duty to ensure that the laws of the state are faithfully executed); *Ex parte Young*, 209 U.S. 123 (1908) (state officials who have the power to enforce unconstitutional state laws may be enjoined from enforcing them). Accordingly, the lower court correctly concluded on the basis of existing law that this case presents a justiciable controversy.

C. Question Four of the Petition was Not Decided by the Courts Below.

Petitioners' fourth question improperly invites this Court to undertake a wholesale review of its entire body of abortion jurisprudence, the vast majority of which was not considered in the decisions below. As discussed in Section I, *supra*, this case is governed by discrete and well-established precedents that govern parental involvement laws. It is difficult, if not impossible, to imagine how this case, which requires no new interpretation or expansion of established constitutional principles, could present the Court with an appropriate opportunity for delving into the very basis and scope of a

woman's right to choose an abortion. At a minimum, because these issues were not ruled on by the courts below, they provide no basis for the grant of certiorari. Sup. Ct. R. 10 (c). [13]

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[13] Petitioners have not sought review of the *Salerno/Casey* question addressed in a number of lower federal court decisions. *See Casey*, 505 U.S. at 895 (suggesting that an abortion law is facially invalid if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); *United States v. Salerno*, 481 U.S. 739, 745 (1987) (in a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid"). *Compare, e.g., Miller*, 63 F.3d at 1456-58 (*Casey* standard displaced *Salerno* standard for facial challenges); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (rejecting applicability of *Salerno), cert. denied*, 117 S. Ct. 2453 (1997); *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (on remand) (the Supreme Court "set a new standard for facial challenges to pre-viability abortion laws"); *Women's Medical Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1062 (S.D. Ohio 1995) ("this Court declines to apply *Salerno* to the challenged [abortion] regulations in this case"), *appeal docketed*, Nos. 96-3157 & 96-3159 (6th Cir. Feb. 8, 1996); *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1447-48 (S.D. Ind. 1995) ("this court believes that *Casey* effectively displaced *Salerno*'s application to abortion laws"), *appeal stayed*, No. 95-3965 (7th Cir. Jan 22, 1996), *with Barnes v. Moore*, 970 F.2d 12, 14, n.2 (5th Cir.), *cert. denied*, 506 U.S. 1021 (1992) (*Casey* did not overrule *Salerno*). As both of the lower courts correctly held, resolution of the *Salerno/Casey* issue is not necessary to disposition of this case. 15a; 85a n.2. Louisiana's parental consent law fails to pass constitutional muster even under the stricter *Salerno* standard for the challenged statute denies *all* minors seeking a court bypass access to an anonymous and independent bypass procedure. *See supra* at 8-9. Thus, it does not present a clear case for resolution of this question. *See Janklow v. Planned Parenthood*, 116 S. Ct. 1582, 1583 (1996) (Stevens, J., respecting denial of certiorari).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: September 10, 1997.

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Supreme Court of the United States

October Term, 1997

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Petitioners,

versus

CAUSEWAY MEDICAL SUITE and HOPE MEDICAL GROUP FOR WOMEN, On behalf of themselves and the patients they serve,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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TABLE OF CONTENTS

Item of Content	Page
Table of Authorities Cited	ii
Argument	1
I. Recent Internal Fifth Circuit Action In This Case and Seven-Judge Dissent from Denial of *En Banc* Reconsideration	1
II. Other Points In Reply	2
Conclusion	10

TABLE OF AUTHORITIES CITED

Page

CASES:

Bellotti v. Baird, 443 U.S. 622 (1979) (*Bellotti II*) 4

Causeway Medical Suite, et al. v. Ieyoub, et al., 109 F.3d 1096 (1997) 5

Bowman v. Weill Const. Co., 494 So.2d 314 (La. 1986) 3

Doe v. Bolton, 410 U.S. 179 (1973) 4

Glick v. McKay, 937 F.2d 434 (1991) 8

H.L. v. Matheson, 450 U.S. 398 (1980) 4

Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., et al., 396 So.2d 878 (1981) 8

In the Interests of the Minor Child, J.M., 590 So.2d 565 (La. 1991) 3

Lambert v. Donald G. Lambert Const. Co., 370 So.2d 1254 (La. 1979) 3

Lambert v. Wicklund, ___ U.S. ___, 117 S.Ct. 1169, 137 L.Ed.2d 464 (March 31, 1997) 8, 9, 10

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) 5

Members of the City Council of the City of Los Angeles, et al. v. Taxpayers for Vincent, et al., 466 U.S. 789 (1984) 6

Opdenwyer v. Brown, 155 La. 617, 99 So. 482 (1924) 6

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 6

State v. Muller, 365 So.2d 464 (1978) 7

TABLE OF AUTHORITIES CITED – Continued

Page

State v. Standard Oil Co. of Louisiana, 188 La. 978, 178 So. 601 (La. 1938) 3

State v. Thomas, 579 So.2d 1086 (La. App. 4th Cir. 1991), *writ den.*, 586 So.2d 535 (La. 1991).....3, 5

U.S. v. Raines, 362 U.S. 17 (1960)..... 5

U.S. v. Salerno, 481 U.S. 739 (1987).....5, 6

Wicklund v. Salvagni, 93 F.3d 567 (1996) 8

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. III..... 5

STATUTORY PROVISIONS:

La. Ch. C. art. 104(2) 3

La. Ch. C. art. 106..... 6

La. C.C.P. art. 2083(A) 8

La. C.C.P. art. 5051 .....2, 3

La. C.C.P. art. 5055 6

La. R.S. 1:7..... 6

La. R.S. 40:1299.35.5(B)(8) through (12)..... 8

La. R.S. 40:1299.35.5(B)(13)..... 3

MISCELLANEOUS:

Federal Rules of Appellate Procedure:

Fifth Circuit Local Rule 28.2.6 5

REPLY ARGUMENT

May It Please The Court:

I. Recent Internal Fifth Circuit Action In This Case and Seven-Judge Dissent from Denial of *En Banc* Reconsideration

On September 23, 1997, the U.S. Court of Appeals for the Fifth Circuit entered in its record of this case a *Per Curiam* reciting that an active member of the court (*sua sponte*) requested a poll of the active judges to determine whether a majority of such judges would vote to grant a rehearing *en banc* herein and that because a majority of the active judges failed to vote in favor of granting same, rehearing *en banc* was denied. Attached to this *Per Curiam*, however, was an impeccably reasoned, strongly persuasive opinion dissenting from the denial of the *en banc* rehearing. This dissenting opinion was authored by Circuit Judge Edith H. Jones and joined in by six other Circuit Judges.

Writ petitioners have already forwarded copies of these papers to this Honorable Court to serve in supplement to the writ petition's appendix. The dissenting opinion (*per* JONES, Cir. J.) provides virtually a complete answer and reply to plaintiff-respondents' (hereinafter simply "Causeway") brief in opposition. Hence, writ petitioners, by this reference, adopt this same dissenting opinion in and as the main portion of this reply brief as though written out herein *in extenso*.

II. Other Points In Reply

A. The opposition argument by Causeway and the thoughtful reasoning of the dissenting opinion authored by Circuit Judge Edith H. Jones (hereinafter simply, "Jones Opinion")[1] reveals the importance to this case of writ petitioners' Question No. 2, which is not moot. The Jones Opinion gives proper recognition to the fact that these statutory procedural provisions under attack by Causeway intend only to provide the means for assuring a *real* judicial decision – one applying the due process principles of reasoned judgment, evidentiary evaluation, and the providing of such protections as the particular circumstances of each case demands – by the juvenile court of the individual matter before it rather than an empty, hollow sham of an adjudication. Due process requires no less. In doing so, the Jones Opinion, unlike the majority decision and opinion of the Fifth Circuit in this case, which ignores the Louisiana Supreme Court precedent on this principle of statutory interpretation and construction of procedural statutes, gives proper deference to the *overriding* principle of statutory interpretation and construction for Louisiana *procedural* statutes – *viz.*, that such statutes are to be construed with due regard for the fact that rules of procedure are not ends in themselves but rather implement the substantive law for the purpose of achieving substantial justice for the parties. La. C.C.P.

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[1] The dissenting opinion by Circuit Judge Emilio Garza as a panel member on first consideration by the Fifth Circuit will, in contrast, hereinafter be referred to simply as the "Garza Opinion."

art. 5051.[2] *See also Bowman v. Weill Const. Co.*, 494 So.2d 314 (La. 1986); *Lambert v. Donald G. Lambert Const. Co.*, 370 So.2d 1254 (La. 1979); *State v. Standard Oil Co. of Louisiana*, 188 La. 978, 178 So. 601 (La. 1938). Proper recognition is also implied in the Jones Opinion for the role of Louisiana's juvenile courts, whose very existence and inherent powers have the "primary aim . . . to effectuate whatever action . . . would be in the 'best interest' of the child or children involved," *State v. Thomas*, 579 So.2d 1086, 1087 (La. App. 4th Cir. 1991), *writ den.*, 586 So.2d 535 (La. 1991).

Thus, the Jones Opinion properly recognizes that the parental notification provision is to provide the juvenile court with the information and evidence it needs to make a proper adjudication – *i.e.*, a reasoned and reasonable decision based on all the relevant facts of each particular case – as to whether abortion is really in the best interests of the minor. Accordingly, the actual making of a judicial decision as to whether it is in the minor's best interests to notify her parents includes a careful judicial weighing of several substantial factors, which include, but are not necessarily limited to, (1) whether or how much needed

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[2] Both the La. Children's Code (Ch.C.) and the La. Code of Civil Procedure (C.C.P.) are generally applicable to these juvenile court proceedings. *See*, the latest version of La. R.S. 40:1299.35.5(B)(13), Ch.C. art. 104(2), and *In the Interests of the Minor Child, J.M.*, 590 So.2d 565, 568-571 (La. 1991) (provisions of civil procedure in Louisiana's Revised Statutes of 1950 must be read *in pari materia* with the concurrently applicable Code of Civil Procedure (and Children's Code in this particular matter) so as to constitute a wholly integrated, consistent body of procedural law applicable to case).

is the input of the parent(s) to a proper determination of whether the abortion is in the best interest of their minor daughter, (2) whether the abortion is, under the evidence already adduced, clearly in the best interests of the immature minor without parental notification, (3) whether or to what extent a particular minor may be at risk for abuse from her parent(s) as a result of the notification or from an adult boyfriend or others as a result of a failure to make the notification, and (4) whether and/or to what extent her particular circumstantial facts, physical, psychological, and medical condition and history, personality development and disposition, beliefs, heirarchy of values, personal history, education, and other factors identified in *Doe v. Bolton*, 410 U.S. 179 (1973) [*Cf. H.L. v. Matheson*, 450 U.S. 398, 404-405 (1980)] as being necessary and pertinent to a proper abortion determination can be obtained from alternative sources more agreeable to the minor.

In this regard, then, writ-petitioners' Question No. 2 is not moot; only the language issue over the words *shall* and *may*, which the Fifth Circuit panel majority had difficulty interpreting and, indeed, misinterpreted under state law and jurisprudence, is moot. Causeway apparently does not understand Question No. 2 or its real depth down to the heart and essence of due process, upon which all of the *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*) and post-*Bellotti II* jurisprudence is purportedly based. Thus, the juvenile court must consider each case as a whole and apply the due process principles of reasoned judgment, evidentiary evaluation, and the providing of such protections as the particular circumstances of each case demands (all "to effectuate whatever action- . . . would be in the 'best interest' of the child or children

involved," *State v. Thomas, supra*). Question No. 2 is the real, underlying issue in all of this jurisprudence dealing with judicial by-passes, because, in applying "the rule of reason" within these court procedures, it clarifies that all of Causeway's bizarre hypothetical results cannot be reasonably anticipated actually to occur and are not cognizable in considering the constitutional validity of Louisiana's procedural statute herein.[3]

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[3] Causeway notices in its opposition brief at p. 20 n.13 that writ petitioners herein did not seek review of the application in this case by the Fifth Circuit panel majority of the standard for judicial review of the facial validity of statutes announced in *U.S. v. Salerno*, 481 U.S. 739 (1987). *See Causeway Medical Suite, et al. v. Ieyoub, etc., et al.*, 109 F.3d 1096, 1104 (1997) ("like the district court, we apply the more rigorous *Salerno* standard to [the legislative enactment in this case]"). The standards of review governing the outcome of a case are always issues considered in a Fifth Circuit appeal. *Cf.* Fifth Circuit Local Rule 28.2.6. Writ petitioners did not seek review of this particular action of the appellate court below in this case because writ petitioners, not Causeway, prevailed on this issue; it would have been Causeway's burden to seek review of this issue by filing a cross-petition for *certiorari* if Causeway desires to have this ruling of the appellate court below changed. Otherwise, it should stand as the law applicable to this case.

Moreover, it is submitted that the standard of review urged in the appellate court below by Causeway, in effect, encourages the federal courts to exceed and violate their U.S. Const. art. III limitations, as well as the separation of powers structured in the U.S. Constitution. From the earliest times, the court's authority to declare a statute unconstitutional can arise only within a "case or controversy" for the purpose of deciding such case or controversy in accordance with a constitutional provision rather than a conflicting statutory provision. *Marbury v. Madison*, 1 Cranch 137, 177-178, 2 L.Ed. 60, 73-74 (1803); *U.S. v. Raines*, 362

B. Causeway's opposition brief argument that the statute requires that *both* parents must be notified in every case where notification is in the minor's best interest is unfounded. In this statute, the plural also denotes the singular, and *vice-versa*. *See* La. R.S. 1:7, La. Ch. C. art. 106, and La. C.C.P. art. 5055. Cases such as *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482 (1924) (reconciling Civil Code articles on fixing boundaries of immovable property with articles on acquisitive prescription of immovable property and recognizing that unlike a string of statutes that might be referred to as a "code" in the

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U.S. 17, 20-21 (1960). In the case of *Members of the City Council of the City of Los Angeles, et al. v. Taxpayers for Vincent, et al.*, 466 U.S. 789, 796-798 (1984) (*per* STEVENS, J.), this court explained that facial invalidity was justified when the constitutional infirmity necessarily occurred within every case or controversy to which it would apply – that is, in all of the statute's applications – such that "a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner," *id*. It is further submitted that the standard for facial invalidity was improperly argued and correctly rejected (for the wrong reason) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for there the argument was that a statutory spousal notification provision operated constitutionally in those circumstances where the pregnant wife did not object to the notification but voluntarily concurred in telling her husband. Such a circumstance of voluntary compliance does not present true "case or controversy" jurisdiction in which the *Salerno* standard of federal court adjudication must operate. Likewise, the legislative branch is entitled to its power of enacting legislation by which the outcome of all those cases or controversies to which such legislation applies in a valid manner are governed and decided. Facially striking down a statute which operates validly in its application to a case of controversy, therefore, embroils the judiciary in depriving the legislative branch of a valid exercise of its constitutional power.

Common Law, a Civil Code is a comprehensively integrated body of law that is necessarily worded "with extreme care," 155 La. at 624, 99 So. at 484) and *State v. Muller*, 365 So.2d 464 (1978) (construing amended language in a substantive criminal statute defining and criminalizing obscenity in a certain manner in order to provide for its *stricti juris* application as required by Louisiana law and jurisprudence) – cases cited by Causeway in brief at pp. 9-10 n.4 – have no application under Louisiana law and jurisprudence to the kind of civil procedure statute residing in the Louisiana Revised Statutes of 1950 that is under attack in this case. Indeed, in terms of the reasoned determination that the juvenile court must make, it is possible under the language of this statute that both parents, one parent, or no parents at all, may be notified.

C. Also unfounded is Causeway's argument that once, in one of these proceedings, the juvenile court judge makes a determination that it is in the immature minor's best interest to notify her parents, the minor cannot avoid it, even if a higher court on appeal later might reverse any finding upon which such notification is predicated or even if the minor might, in light of that determination, prefer to choose other options such as not seeking the judicial-bypass authorization for the abortion in lieu of parental consent or deciding to carry the pregnancy to term without parental involvement or traveling to another state with different laws on minors and abortion or notifying and involving her parents on her own at a later time. *See* Causeway's brief at pp. 9-10 (and n. 5 on p. 10) and pp. 13-14. Under general procedural provisions and practice which must be read *in pari materia* with this

Louisiana procedural statute and are, therefore, applicable to these proceedings [*see* footnote 2, *supra*], not only has the minor applicant the power to withdraw (voluntarily dismiss) her court action and petition (application) at virtually any time *pendente lite*, thereby ending the proceedings and her quest for the judicial abortion authorization, but she also has an immediate right to appeal – which would be done according to the method specified in the latest version of La. R.S. 40:1299.35.5(B)(8) through (12) – "an interlocutory judgment which may cause irreparable injury," La. C.C.P. art. 2083(A), such as a decision to notify parents, or otherwise to invoke supervisory review of such an order. *See Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., et al.*, 396 So.2d 878 (1981) and footnote 1 therein.

D. Much of the overall thrust of Causeway's main argument in opposition brief is merely a recycling of the *Glick v. McKay*, 937 F.2d 434 (1991) and *Wicklund v. Salvagni*, 93 F.3d 567, 571-572 (1996) reasoning, which was summarily rejected in a *Per Curiam* opinion by this U.S. Sup. Ct. in *Lambert v. Wicklund*, ___ U.S. ___, 117 S.Ct. 1169, 137 L.Ed.2d 464 (March 31, 1997). Causeway objects that under Louisiana's statute an immature minor is subjected to the risk that her parents might be notified if such notification is found to be in her best interests, even if the abortion is also later found to be in her best interests – that is, even if *the abortion* is ultimately found to be in her best interests, the court will nevertheless have notified her parent(s) if it had first found that such *parental notification* was in her best interests. The contention is

that such parental notification violates *Bellotti II*'s anonymity requirement for parental-consent bypass procedures. But the parent or guardian of *every minor seeking an abortion* in Montana under *Lambert, including immature minors for whom abortion is in their best interests,* is to be notified of the abortion unless the minor shows to the court that she is mature and knowledgeable enough to make the abortion decision on her own, that she would be subject to parental abuse, or that such *parental notification* is not in her best interests (substantively, the same test as herein, since her best interests preclude exposure to abuse). Consequently, the same result that obtained in *Lambert v. Wicklund, supra,* should obtain in this case on this writ petition.

E. Causeway is in error in its contention that Question No. 4 was not an issue considered by the Fifth Circuit in arriving at its decision in this case. Certainly, one panel member considered it to be at the heart of the whole case. *See,* of course, the Garza Opinion. Question No. 4 is clearly an implicit, if not explicit, issue in every case involving minors and abortion, for such jurisprudence provides the foundational authority that is the *sine qua non* for the Fifth Circuit's decision in this case. Without that foundational authority, the outcome of the Fifth Circuit's decision herein would necessarily have been directly the opposite of what it was. Clearly, then, Question No. 4 was and is at the essence of the adjudication controlling the outcome and result of the ultimate decision obtained by the Fifth Circuit majority in this case.

CONCLUSION

Considering the foregoing, the writ petition, the Jones Opinion, and the Garza Opinion, this Honorable Court should grant the writ petition in this case and summarily reverse in a *Per Curiam* as was done in *Lambert v. Wicklund, supra*, or, alternatively, place this case on the calendar for briefing and argument on the merits.

Respectfully submitted,

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